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2968

No. 15085

United States
Court of Appeals
for the Ninth Circuit

TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division**

FILED

JUN 19 1956

No. 15085

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TWENTIETH CENTURY DELIVERY SERVICE, INC., a Corporation,

Appellant,

vs.

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Transcript of Record

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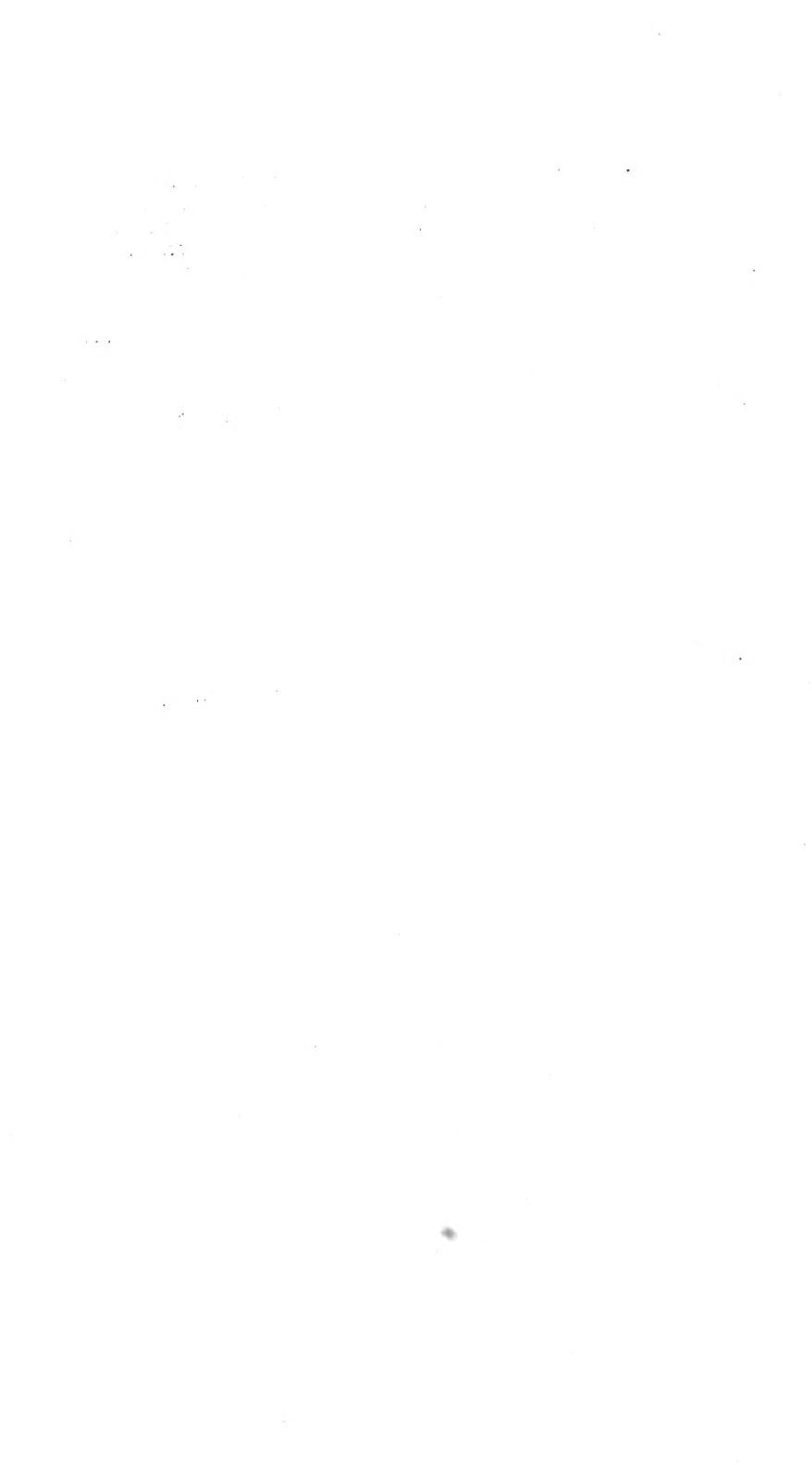


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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
Southern District of California Central Division
No. 17927-Y

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Cor-
poration; AIR CARGO, INC., a Corpora-
tion; TWENTIETH CENTURY DELIVERY
SERVICE, INC., a Corporation; DOE I;
DOE II; DOE III; and DOE IV,

Defendants.

FIRST AMENDED COMPLAINT FOR DAM-
AGES FOR BREACH OF CONTRACT AND
NEGLIGENCE IN CARRIAGE OF GOODS

Comes Now the plaintiff, and for cause of action
against defendants, and each of them, alleges:

I.

That plaintiff is a corporation organized and ex-
isting under and by virtue of the laws of the State
of Minnesota, with a principal place of business in
the city of St. Paul, Minnesota, and authorized to
do and doing business in the State of California as
an insurance company. [2*]

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

II.

That defendant Trans World Airlines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and maintaining an office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

III.

That defendant Air Cargo, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and maintaining an office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

IV.

That defendant Twentieth Century Delivery Service, Inc., is a corporation organized and existing under and by virtue of the laws of one of the states of the United States, other than the State of California, and maintains an office and place of business in the City of Los Angeles, County of Los Angeles, State of California.

V.

That plaintiff does not know the true names or capacities of defendants Doe I, Doe II, Doe III and Doe IV, and prays that when their true names and capacities have been ascertained this complaint and all proceedings therein may be amended accordingly.

VI.

That at all times Doe I was the agent, servant and employee of defendant Trans World Airlines, Inc.,

and at all times mentioned was acting in the course and scope of his employment as such agent, servant and employee with the permission of his co-defendants.

VII.

That at all times Doe II was the agent, servant and employee of defendants Air Cargo, Inc., and Twentieth Century Delivery Service, Inc., and at all times mentioned was acting in the course and scope of his employment as such agent, servant and employee. [3]

VIII.

That at all times mentioned in the complaint Calnevar Company was a corporation organized and existing under and by virtue of the laws of the State of California, and maintaining an office and principal place of business in the County of Los Angeles, State of California.

IX.

That on or about July 10, 1954, Calnevar Company entered into a written contract with defendant Trans World Airlines, Inc., at St. Louis, Missouri, for the carriage from St. Louis, Missouri, to Los Angeles, California, of one prototype automatic coffee vending machine and one carton of parts, and did then and there deliver said freight in good order and condition to Trans World Airlines, Inc., and agree to pay the transportation charges thereon; that said automatic coffee vending machine was of the approximate value of \$130,000.00; that defendant Trans World Airlines, Inc., did enter into

said contract of carriage and did transport said automatic coffee vending machine and carton of parts to Los Angeles, California.

X.

That plaintiff is informed and believes, and on such information alleges, that defendant Trans World Airlines, Inc., did hand said air freight to its co-defendants at Los Angeles International Airport, and direct its delivery to the Calnevar Company at 1732-42 West Washington Boulevard, Los Angeles, California.

XI.

That plaintiff is informed and believes, and on such information alleges, that on July 12, 1954, defendants did transport said automatic coffee vending machine by truck to a public street of the City and County of Los Angeles located in front of the Calnevar Company, and defendants were then advised by employees of the Calnevar [4] Company that they would obtain assistance to remove from defendant's truck said automatic coffee maker; that while Calnevar Company's employees were obtaining assistance, defendants dragged said coffee maker off the rear bed of said truck and dropped it approximately 40 inches to the street pavement with great force and violence.

XII.

That by reason of the gross negligence of defendants, and each of them, said automatic coffee vending machine was caused to be physically damaged to

the extent of \$7,725.00, and required the expenditure of labor, parts and material before it could be again utilized by the Calnevar Company.

XIII.

That prior to July 10, 1954, plaintiff had issued to the Calnevar Company a property damage policy with limits of \$75,000.00, which was at all times mentioned in the complaint in full force and effect; that said policy provided that in addition to paying for damage to property thereby covered, plaintiff would pay to the assured, Calnevar Company, the sum of twenty-five percent (25%) of the amount of physical damage by and for the loss of use of said article so insured; that pursuant to the terms of said policy, plaintiff did pay to the Calnevar Company \$9,656.25, and did thereby become subrogated to all of the rights of the said Calnevar Company, and to the extent of said payment did receive written assignment thereof.

XIV.

That plaintiff has heretofore made a demand upon defendants for payment of its subrogated claim and the same has been denied; that by reason of defendants' negligent failure to safely and properly transport and convey the aforesaid automatic coffee vending machine belonging to the Calnevar Company, plaintiff has been damaged in the sum of \$9,656.25. [5]

For a Second, Separate and Distinct Cause of Action, Plaintiff Complains of Defendants, and Each of Them, as Follows:

I.

Incorporates by reference Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, and XIII of its First Cause of Action, with the same force and effect as though fully set forth at this point.

II.

That on July 12, 1954, defendants delivered to the Calnevar Company at West Washington Boulevard, Los Angeles, California, said automatic coffee vending machine in a damaged and broken condition; that by reason of defendants' breach of contract and failure to safely and properly transport and convey the aforesaid automatic coffee vending machine, plaintiff has been damaged in the sum of \$9,656.25.

Wherefore, plaintiff prays that it recover damages in the amount of \$9,656.25, together with costs of suit and interest, and such other and further relief as may be just and proper in the premises.

LILLICK, GEARY & McHOSE,
GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,
Attorneys for Plaintiff.

Affidavit of mail attached.

[Endorsed]: Filed May 25, 1955. [6]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, TRANS WORLD
AIRLINES, INC., A CORPORATION, TO
PLAINTIFF'S FIRST AMENDED COM-
PLAINT

Comes Now defendant, Trans World Airlines, Inc., a corporation, and, appearing for itself alone and not for any other defendant herein, answers plaintiff's First Amended Complaint and denies, admits and alleges:

Answering the First Cause of Action of Said Complaint, This Answering Defendant Denies, Admits and Alleges:

I.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph I, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

II.

This answering defendant admits Paragraph II.

III.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph III, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

IV.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph IV, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

V.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph V, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

VI.

This answering defendant denies, generally and specifically, Paragraph VI, and each and every allegation therein contained.

VII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VII, and placing its answer on that ground denies, generally and specifically, said paragraph and each and every allegation therein contained.

VIII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VIII, and placing its answer on that ground denies, generally and specific- [* * *] [9]

IX.

Answering Paragraph IX of plaintiff's First Amended Complaint, this answering defendant admits that on or about July 10, 1954, Calnevar Company entered into a written contract with this answering defendant at St. Louis, Missouri for the carriage from St. Louis, Missouri to Los Angeles, California, of one crated vending machine and one carton of parts which were delivered to this answering defendant at St. Louis, Missouri, and that this answering defendant did enter into said contract of carriage and did transport said crated vending machine and carton of parts to Los Angeles, California; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph IX, and each and every allegation therein contained.

X.

Answering Paragraph X of plaintiff's First Amended Complaint, this answering defendant admits that it did hand said air freight to the defendant, Twentieth Century Delivery Service, Inc., a corporation, for delivery to the Calnevar Company at 1732-42 West Washington Boulevard, Los Angeles, California; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph X, and each and every allegation therein contained.

XI.

Answering Paragraph XI of Plaintiff's First Amended Complaint, this answering defendant ad-

mits that defendant Twentieth Century Delivery Service, Inc., a corporation, did transport said automatic coffee vending machine by truck to a public street of the City and County of Los Angeles, located in front of the Calnevar Company; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph XI, and each and every allegation therein [10] contained.

XII.

This answering defendant denies, generally and specifically, Paragraph XII, and each and every allegation therein contained.

XIII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph XIII, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

XIV

Answering Paragraph XIV of plaintiff's First Amended Complaint, this answering defendant admits that plaintiff made a claim for payment of its alleged subrogated claim and that this answering defendant has denied the same; and, except as herein expressly admitted, this answering defendant denies, generally and specifically, said Paragraph XIV, and each and every allegation therein contained, and further denies that plaintiff has been damaged in the sum of \$9,656.25, or any other sum, or at all.

XV.

Further answering plaintiff's First Amended Complaint, and each and every paragraph, sentence, word and figure thereof, this answering defendant denies that it was, or any of its agents or servants or employees were, guilty of any negligence or carelessness or gross negligence, either as alleged in said First Amended Complaint, or otherwise, or at all, and denies that plaintiff's damages, if any, either as alleged, or otherwise, or in any amount alleged, or in any other amount, or the accident mentioned in said First Amended Complaint, were caused by said alleged, or any, negligence or carelessness or gross negligence of this answering defendant, or of any agent or servant or employee [11] of this answering defendant. As to the amount of plaintiff's alleged damages, this answering defendant has no information or belief sufficient to enable it to answer, and placing its answer on that ground denies that plaintiff was damaged in any sum alleged, or in any other sum, or at all.

Answering the Second Cause of Action of Said First Amended Complaint, This Answering Defendant Denies, Admits and Alleges:

I.

Answering Paragraph I, this answering defendant repeats all of the allegations and denials in its Answer to the First Cause of Action and makes the same a part hereof as though herein fully rewritten.

II.

This answering defendant denies, generally and specifically, Paragraph II, and each and every allegation therein contained.

For a Second, Separate, Further and Distinct Answer and Defense Herein, This Answering Defendant Alleges:

I.

That the accident mentioned in plaintiff's First Amended Complaint, and whatever damage, if any, has been sustained by plaintiff by reason thereof, was the result of an inevitable and unavoidable accident, so far as this answering defendant is concerned.

For a Third, Separate, Further and Distinct Answer and Defense Herein, This Answering Defendant Alleges:

I.

That on or about July 10, 1954, defendant Trans World [12] Airlines, Inc., a corporation, issued to the Calnevar Company, a corporation, its Uniform Airbill, being Airbill Number STL-933916 for the carriage of that certain vending machine and carton of parts referred to in plaintiff's First Amended Complaint; that said Uniform Airbill provided in part as follows:

"It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing classifications and tariffs in effect

as of the date hereof which are filed in accordance with law. Said classifications and tariffs, copies of which are available for inspection by the parties hereto, are hereby incorporated into and made a part of this contract.

Declared Value—Agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon.”

II.

That there was issued to defendant Trans World Airlines, Inc., a corporation, a Certificate of Public Convenience and Necessity by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sec. 481).

III.

That pursuant to the terms of the Civil Aeronautics Act, the defendant, Trans World Airlines, Inc., a corporation, duly filed, posted and published its tariffs in the form and manner required; that said tariffs are printed and kept open to public inspection and said tariffs are designated Official [13] Air-Freight Rules, Tariff No. 1-A, C.A.B. No. 13.

IV.

That the tariff established by the Civil Aeronautics Authority, and which was in effect at the time of said flight and constituted a part of the contract of carriage between plaintiff's named assured,

Calnevar Company, a corporation, and this answering defendant, provided in part as follows:

“Limit of Liability:

“(a) In consideration of carrier’s rate for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment as determined pursuant to Rule 4.3, the shipper and all other parties having an interest in the shipment agree that the value of the shipment shall be determined in accordance with the provisions of Rule 4.3 and that the total liability of the carrier shall in no event exceed the value of the shipment as so determined.

“(b) By tendering the shipment to carrier for transportation, the shipper, for himself and all other parties having an interest in the shipment, waives all claims for damages beyond the limitations set forth in these rules and regulations and affirms the description of the shipment as recited on the airbill, and the fact that the shipment is not of a nature unsuitable for carriage by air or hazardous thereto.”

V.

That Rule 4.3 referred to above provided in part as follows:

“Charges for Declared Value:

“(a) 1. A shipment shall be deemed to have a declared value of \$0.50 per pound (but not [14] less than \$50.00) unless a higher value is declared on

the Airbill at the time of receipt of the shipment from the shipper.

“2. (Not applicable to AA, BNF, DAL, MAL, PAI.) Except as otherwise provided in this rule, each part of a shipment handled in Assembly or Distribution Service, as defined in Rule 6.5, shall be deemed to have a declared value of \$0.50 per pound unless a higher value is declared on the Airbill for such part at the time of receipt of shipment from shipper.

“3. An additional transportation charge of \$0.10 shall be required for each \$100.00 (or fraction thereof) by which the value declared on the Airbill at the time of receipt of the shipment from the shipper, exceeds \$0.50 per pound or \$50.00 (whichever is higher).

“4. The weight used to determine the declared value of a shipment shall be the same as that which is used to determine the transportation charge for such shipment.

“5. A shipment consisting of a commodity and/or article named in paragraph (b) of this rule, moving on one Airbill over the lines of two or more carriers, shall be deemed to have for its entire movement the lowest declared value established by any one of such carriers, unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper, in which event the highest additional transportation charge established by

any one of such carriers shall [15] be applicable to the shipment for its entire movement.”

VI.

That Rule 3.1 (c) of said Airfreight Rules Tariff No. 1-A, provided in part as follows:

“(c) The Airbill and the tariffs applicable to the shipment shall apply at all times when the shipment is being handled by or for the carrier, including air transportation by the carrier and pickup, delivery and other ground services rendered by the carrier, or any other person performing for the carrier, such pickup, delivery or ground services in connection with the shipment.”

VII.

That neither the plaintiff's assured Calnevar Company, nor anyone on its behalf, at the time this answering defendant entered into a written contract with said Calnevar Company, or at any other time, notified or declared to this answering defendant, or anyone on behalf of said defendant, that any cargo was of a value in excess of the value of \$0.50 per pound.

VIII.

That said cargo weighed 245 pounds; that neither plaintiff's assured Calnevar Company, nor anyone on its behalf, at any time paid to this answering defendant any tariff or rate as an additional transportation charge of \$0.10, or any other sum, required for each additional \$100.00, or fraction

thereof, of declared value, or any tariff or rate at all in connection with any excess value of said cargo.

Wherefore, this answering defendant prays that plaintiff take nothing against it by reason of plaintiff's action [16] herein, and that this answering defendant have judgment against plaintiff for its costs herein incurred, and for such other and further relief as may seem just and proper.

CRIDER, TILSON & RUPPE,

By /s/ DONALD E. RUPPE,
Attorneys for Defendant Trans World Airlines,
Inc., a Corporation.

Affidavit of mail attached.

[Endorsed]: Filed June 2nd, 1955, [17]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Comes now the defendant Twentieth Century Delivery Service, Inc., a corporation, and answering the first amended complaint on file herein for itself alone, admits, denies and alleges as follows:

Answer to First Cause of Action

I.

As to the allegations of paragraph III, this defendant denies that Air Cargo, Inc., maintains an

office and place of business in the County of Los Angeles, City of Los Angeles, State of California.

II.

As to the allegations of paragraph IV, defendant admits said allegations except that this defendant alleges that said corporation is organized and existing by virtue of the laws of [19] the State of California.

III.

As to the allegations of paragraphs V, VI, VIII and XIII, this defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations.

IV.

As to the allegations of paragraphs VII, XII and XIV, this defendant denies each and every allegation, thing and matter contained in said paragraphs; defendant further denies that plaintiff was damaged in the sum alleged, or in any other sum or at all, whether for the reasons alleged, or otherwise.

V.

As to the allegations of paragraph IX, this defendant admits that on or about July 10, 1954, Calnevar Company entered into a written contract with Trans World Airlines, Inc., at St. Louis, Missouri, for the carriage from St. Louis, Missouri, to Los Angeles, California, of one crated vending machine and one carton of parts which were delivered to Trans World Airlines, Inc., at St. Louis, Missouri, and that Trans World Airlines, Inc., did enter into

said contract of carriage and did transport said crated vending machine and carton of parts to Los Angeles, California; and, except as herein expressly admitted, this defendant denies generally and specifically said paragraph IX, and each and every allegation therein contained.

VI.

As to the allegations of paragraph X, this defendant admits that Trans World Airlines, Inc., did hand said air freight to this defendant for delivery to the Calnevar Company at 1732-42 West Washington Boulevard, Los Angeles, California; and, except as herein expressly admitted, this defendant denies generally and specifically said paragraph X, and each and every allegation therein [20] contained.

VII.

As to the allegations of paragraph XI, this defendant admits that this defendant did transport said automatic coffee vending machine by truck to a public street of the City and County of Los Angeles located in front of the Calnevar Company; and, except as herein expressly admitted, this defendant denies generally and specifically said paragraph XI, and each and every allegation therein contained.

VIII.

This defendant denies that plaintiff sustained damages in any sum or amount whatsoever as the direct or proximate result of any alleged act or acts, fault or carelessness or negligence or reckless-

ness on the part of this defendant, or any of its agents, servants or employees, whether as set forth in the complaint, or otherwise, or at all.

Answer to Second Cause of Action

I.

Answering paragraph I, defendant realleges paragraphs I, II, III, IV, V, VI and VIII of its answer to the first cause of action, and incorporates them herein as though specifically set forth at length.

II.

As to the allegations of paragraph II, this defendant denies each and every allegation, thing and matter contained in said paragraph; defendant further denies that plaintiff was damaged in the sum alleged, or in any other sum, or at all, whether for the reason alleged, or otherwise.

For a Second, Separate and Distinct Answer and Defense Herein Defendant Alleges:

I.

That the accident mentioned in plaintiff's First Amended Complaint, and whatever damage, if any, has been sustained by plaintiff [21] by reason thereof, was the result of an inevitable and unavoidable accident so far as this defendant is concerned.

For a Third, Separate and Distinct Answer and Defense Herein Defendant Alleges:

I.

That on or about July 10, 1954, defendant Trans World Airlines, Inc., a corporation, issued to the Calnevar Company, a corporation, its Uniform Airbill, being Airbill Number STL-933916 for the carriage of that certain vending machine and carton of parts referred to in plaintiff's First Amended Complaint; that said Uniform Airbill provided in part as follows:

"It is mutually agreed that the goods herein described are accepted in apparent good order (except as noted) for transportation as specified herein, subject to governing classifications and tariffs in effect as of the date hereof which are filed in accordance with law. Said classifications and tariffs, copies of which are available for inspection by the parties hereto, are hereby incorporated into and made a part of this contract.

"Declared Value—Agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon."

II.

That there was issued to defendant Trans World Airlines, Inc., a corporation, a Certificate of Public Convenience and Necessity by the Civil Aeronau-

tics Board pursuant to the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sec. 481). [22]

III.

That pursuant to the terms of the Civil Aeronautics Act, the defendant, Trans World Airlines, Inc., a corporation, duly filed, posted and published its tariffs in the form and manner required; that said tariffs are printed and kept open to public inspection and said tariffs are designated Official Air-freight Rules, Tariff No. 1-A, C.A.B. No. 13.

IV.

That the tariff established by the Civil Aeronautics Authority, and which was in effect at the time of said flight and constituted a part of the contract of carriage between plaintiff's named assured, Calnevar Company, a corporation, and Trans World Airlines, Inc., provided in part as follows:

"Limit of Liability:

"(a) In consideration of carrier's rate for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment as determined pursuant to Rule 4.3, the shipper and all other parties having an interest in the shipment agree that the value of the shipment shall be determined in accordance with the provisions of Rule 4.3 and that the total liability of the carrier shall in no event exceed the value of the shipment as so determined.

"(b) By tendering the shipment to carrier for transportation, the shipper, for himself and all

other parties having an interest in the shipment, waives all claims for damages beyond the limitation set forth in these rules and regulations and affirms the description of the shipment as recited on the airbill, and the fact that the shipment is not of a nature unsuitable for carriage by air or hazardous thereto." [23]

V.

That rule 4.3 referred to above provided in part as follows:

“Charges for Declared Value:

“(a) 1. A shipment shall be deemed to have a declared value of \$0.50 per pound (but not less than \$50.00) unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper.

“2. (Not applicable to AA, BNF, DAL, MAL, PAI.) Except as otherwise provided in this rule, each part of a shipment handled in Assembly or Distribution Service, as defined in Rule 6.5, shall be deemed to have a declared value of \$0.50 per pound unless a higher value is declared on the Airbill for such part at the time of receipt of shipment from shipper.

“3. An additional transportation charge of \$0.10 shall be required for each \$100.00 (or fraction thereof) by which the value declared on the Airbill at the time of receipt of the shipment from the shipper, exceeds \$0.50 per pound or \$50.00 (whichever is higher).

“4. The weight used to determine the declared value of a shipment shall be the same as that which is used to determine the transportation charge for such shipment.

“5. A shipment consisting of a commodity and/or article named in paragraph (b) of this Rule, moving on one Airbill over the lines of two or more carriers, shall be deemed to have for its entire movement the lowest declared [24] value established by any one of such carriers, unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper, in which event the highest additional transportation charge established by any one of such carriers shall be applicable to the shipment for its entire movement.”

VI.

That Rule 3.1 (c) of said Airfreight Rules Tariff No. 1-A, provided in part as follows:

“(c) The Airbill and the tariffs applicable to the shipment shall apply at all times when the shipment is being handled by or for the carrier, including air transportation by the carrier and pickup, delivery and other ground services rendered by the carrier, or any other person performing for the carrier, such pickup, delivery or ground services in connection with the shipment.”

VII.

That at the time and place of the damage alleged in the plaintiff's complaint this defendant was handling the shipment of the coffee vending machine for

the carrier Trans World Airlines, Inc., and was delivering and performing ground services in connection with the shipment of the said vending machine for Trans World Airlines, Inc. That the Airbill and Tariff hereinbefore pleaded did apply to the shipment of the coffee vending machine at the time and place of the alleged damage.

VIII.

That neither the plaintiff's assured Calnevar Company, nor anyone on its behalf, at the time Trans World Airlines, Inc., [25] entered into a written contract with said Calnevar Company, or at any other time, notified or declared to Trans World Airlines, Inc., or anyone on behalf of said Trans World Airlines, Inc., that any cargo was of a value in excess of the value of \$0.50 per pound.

IX.

This defendant is informed and believes and upon such information and belief alleges that said cargo weighed 245 pounds; that neither plaintiff's assured Calnevar Company, nor anyone on its behalf, at any time paid to Trans World Airlines, Inc., any tariff or rate as an additional transportation charge of \$0.10, or any other sum, required for each additional \$100.00, or fraction thereof, of declared value, or any tariff or rate at all in connection with any excess value of said cargo.

Wherefore, this defendant prays that plaintiff take nothing against it by reason of plaintiff's action herein; that this defendant have judgment

against plaintiff for its costs incurred herein, and for such other and further relief as the court deems just and proper.

/s/ GENE E. GROFF,
Attorney for Defendant Twentieth Century Delivery
Service, Inc.

Affidavit of mail attached.

[Endorsed]: Filed June 15, 1955. [26]

In the United States District Court for the Southern
District of California, Central Division

No. 17927-Y

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corporation;
AIR CARGO, INC., a Corporation;
TWENTIETH CENTURY DELIVERY
SERVICE, INC., a Corporation; DOE I;
DOE II; DOE III and DOE IV,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above matter came on regularly for trial on
January 10, 1956, before the Honorable Leon R.

Yankwich, Judge of the United States District Court, plaintiff St. Paul Fire and Marine Insurance Company appearing by its attorneys, Messrs. Lillick, Geary & McHose by Gordon K. Wright, Esq.; defendant Trans World Airlines, Inc., a corporation, appearing by its attorneys, Messrs. Crider, Tilson & Ruppe by Donald E. Ruppe, Esq., and Robert D. Brill, Esq.; and defendant Twentieth Century Delivery Service, Inc., a corporation, by its attorney Gene E. Groff, Esq., and testimony both oral and documentary [32] having been received by the court on January 10 and 11, 1956, and the court having considered the evidence and the law and the arguments of counsel and the plaintiff having voluntarily dismissed as to defendant Trans World Airlines, Inc., pursuant to Rule 14 of Federal Rules of Civil Procedure, and the court having filed its Minute Order on January 18, 1956, awarding judgment in favor of plaintiff, the court hereby makes the following findings of fact and conclusions of law:

The court finds as true the following facts:

I.

Plaintiff St. Paul Fire and Marine Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota.

II.

Trans World Airlines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

III.

Twentieth Century Delivery Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California.

IV.

Calnevar Company was a corporation organized and existing under and by virtue of the laws of the State of California.

V.

Prior to July 10, 1954, and for a period including July 12, 1954, plaintiff St. Paul Fire and Marine Insurance Company had issued to the Calnevar Company a property damage policy with limits of \$75,000.00, which policy was at all times mentioned in the amended complaint in full force and effect; that said policy provided for the payment of all physical damage sustained to personal property [33] belonging to the assured, Calnevar Company, and therein covered, and did also provide for the payment of the sum of 25 per cent over and above the actual physical damage which might be sustained by the assured, said latter amount being by and for the loss of use of said insured personal property during its restoration and repair.

VI.

On July 10, 1954, Calnevar Company entered into a contract in writing with defendant Trans World Airlines, Inc., at St. Louis, Missouri, for the air transportation from St. Louis, Missouri, to Los Angeles, California, of one prototype automatic

coffee vending machine and one carton of parts, and did on July 10, 1954, deliver said airfreight in good order and condition to Trans World Airlines, Inc.; that said automatic coffee vending machine was at said time and place of the approximate value of \$75,000.00.

VII.

Trans World Airlines, Inc., did issue its airfreight bill No. 933916 on July 10, 1954, providing for transportation of said coffee vending machine and carton of parts; that said airfreight bill provided for charges based on weight-rate and in addition, did separately provide further pick-up and delivery charges; that at said time and place Calnevar Company did agree to pay all of said charges; that Trans World Airlines, Inc., did enter into performance of said contract of carriage and did transport said cargo to Los Angeles, California.

VIII.

On or about July 12, 1954, there was in existence a contract in writing, dated April 1, 1952, between Trans World Airlines, Inc., a corporation, and defendant Twentieth Century Delivery Service, Inc., a corporation, providing for the latter to perform certain services in connection with airfreight transported by Trans World [34] Airlines, Inc., including services of delivery.

IX.

On or about July 12, 1954, Trans World Airlines, Inc., did hand said coffee vending machine in

good order and condition to defendant Twentieth Century Delivery Service, Inc., for delivery to Calnevar at Los Angeles International Airport.

X.

Defendant Twentieth Century Delivery Service, Inc., did on July 12, 1954, transport by motor truck said automatic coffee vending machine to a position in a public street in the City and County of Los Angeles located in front of the premises of the Calnevar Company; that a servant of defendant Twentieth Century Delivery Service, Inc., was advised by an employee of Calnevar Company that the latter would obtain assistance in removing said automatic coffee maker from the bed of defendant's truck; that in disregard of said offer of assistance, the servant of defendant Twentieth Century Delivery Service, Inc., did drag said coffee maker off the rear of said truck and drop it approximately 40 inches causing it to land in an upside-down position on the street pavement with great force and violence.

XI.

That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged.

XII.

That on July 12, 1954, at or about the hour of 3:45 p.m., the physical damage to said automatic

coffee maker was viewed by an inspector employed by Trans World Airlines, Inc.

XIII.

That subsequent to July 12, 1954, said coffee maker was [35] repaired; that the sum of \$7,725 was a reasonable and proper amount for physical repairs; that the sum of \$1,931.25 was the reasonable value of the loss of use of said coffee maker.

XIV.

That the Calnevar Company submitted its sworn proof of loss, dated August 26, 1954, to plaintiff St. Paul Fire and Marine Insurance Company in the amount of \$9,656.25.

XV.

That on August 26, 1954, plaintiff St. Paul Fire and Marine Insurance Company paid to the Calnevar Company, pursuant to the terms of its contract of insurance, the sum of \$9,656.25, representing payment for actual physical damage of \$7,725, plus 25 per cent thereof for loss of use, or \$1,931.25, and did take from the Calnevar Company its subrogation receipt in the amount of \$9,656.25.

XVI.

That defendant Trans World Airlines, Inc., on August 12, 1954, did have on file with the Civil Aeronautics Board its airfreight rules, Tariff No. 1-A, which provided that in consideration of the air carrier's rate for the transportation of any shipment, which rate in part was dependent upon the

value of the shipment as determined pursuant to Rule 4.3 of said Tariff No. 1-A, the shipper, Calnevar Company, agreed that the value of the shipment in respect to Trans World Airlines, Inc., should be determined in accordance with the said Rule 4.3; that said Trans World Airlines, Incorporated's, Rule 4.3 provided that any shipment should be deemed to have a declared value of \$0.50 per pound (but not less than \$50) unless a higher value is declared on the airbill at the time of receipt of shipment from the shipper; that said airbill No. 933916 did not provide for any higher declared value. [36]

XVII.

That on January 7, 1955, Trans World Airlines, Inc., tendered to plaintiff the sum of \$122.50 in full settlement of plaintiff's subrogation claim and that said check was refused and returned to Trans World Airlines, Inc., on January 10, 1955.

XVIII.

That defendant Twentieth Century Delivery Service, Inc., did not on July 10-12, 1954, have on file with the Civil Aeronautics Board any airfreight tariff and was not covered or encompassed within or by the said airfreight tariff of Trans World Airlines, Inc.

XIX.

That there is no evidence that the Calnevar Company entered into any agreement with defendant Twentieth Century Delivery Service, Inc., respecting the value of said automatic coffee maker.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court makes the following Conclusions of Law:

I.

That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc.

II.

That defendant Twentieth Century Delivery Service, Inc., cannot limit its liability for said damage by any provision contained in airfreight tariff of Trans World Airlines, Inc.

III.

That the damage reasonably sustained by Calnevar Company was in the sum of \$9,656.25. [37]

IV.

That plaintiff St. Paul Fire and Marine Insurance Company did pay, pursuant to its contract of insurance, to Calnevar Company the sum of \$9,656.25 and did become subrogated to the rights of Calnevar Company against defendant Twentieth Century Delivery Service, Inc.

V.

That plaintiff is entitled to judgment against Twentieth Century Delivery Service, Inc., in the sum of \$9,656.25.

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed that plaintiff have and recover judgment in the sum of \$9,656.25 against defendant Twentieth Century Delivery Service, Inc., together with its costs of suit taxed in the sum of \$45.00.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form:

/s/ GENE E. GROFF,
Attorney for Defendant Twentieth Century Delivery
Service, Inc.

[Endorsed]: Filed January 26, 1956.

Docketed and entered January 27, 1956. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Twentieth Century Delivery Service, Inc., a Corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 27, 1956.

/s/ GENE E. GROFF,
Attorney for Appellant Twentieth Century Delivery Service, Inc., a Corporation.

Affidavit of service by Mail attached.

[Endorsed]: Filed February 21, 1956. [39]

In the United States District Court, Southern
District of California, Central Division

No. 17927-Y Civil

Honorable Leon R. Yankwich, Judge Presiding.

ST. PAUL FIRE & MARINE INSURANCE
COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corpora-
tion, and TWENTIETH CENTURY DE-
LIVERY SERVICE, INC., a Corporation,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, January 10, 1956

Appearances:

For the Plaintiff:

LILLICK, GEARY & McHOSE, By
GORDON K. WRIGHT, ESQ.,
634 South Spring Street,
Los Angeles 14, California.

For the Defendant Trans World Airlines, Inc.:

CRIDER, TILSON & RUPPE, By
DONALD E. RUPPE, ESQ., and
ROBERT D. BRILL, ESQ.,
548 South Spring Street,
Los Angeles 13, California.

For the Defendant Twentieth Century Delivery Service, Inc.:

GENE E. GROFF, ESQ.,
210 West 7th Street, Room 931,
Los Angeles 14, California.

Tuesday, January 10, 1956, 10:00 A.M.

The Clerk: Are there any ex parte matters?

(No response.)

The Clerk: Case 17927-Y, St. Paul Fire & Marine Insurance versus Trans World Airlines, et al., non-jury trial. For the plaintiff, Mr. Gordon K. Wright of Lillick, Geary & McHose. For TWA, Mr. Donald E. Ruppe and Mr. Robert Brill, and for Twentieth Century Delivery Service, Mr. Gene E. Groff.

The Court: All right, gentlemen, if you desire to make an opening statement, I will hear you.

Mr. Wright: Yes, your Honor. Before doing that, I would like, if I might, to offer into evidence the pre-trial stipulation, which has today been executed by the several counsel, and which is presented to the court.

The Court: It is not on file yet?

The Clerk: Yes.

The Court: Pardon? Has it been handed to the clerk?

Mr. Wright: It is on the clerk's desk, if the court please.

The Clerk: Your Honor, here it is right now.

The Court: Just a minute. You used the word "pre-trial," and, of course, "pre-trial" has a technical meaning as well as a general meaning. This is not a pre-trial order [4*] under Rule 16. This is merely a stipulation by counsel.

Mr. Wright: That is correct, your Honor, for the purpose of this case.

The Court: It may be received in evidence as a plaintiff's exhibit. However, I prefer to have the opening statement precede the receipt of any testimony. [5]

* * *

The Court: Then I want to dismiss as to all of the fictitious names, so that the record will show that we are proceeding against two defendants, Trans World Airlines, Inc., and Air Cargo, Inc.

Mr. Wright: That's right, sir. We may also dismiss, your Honor, as to the defendant Air Cargo, Inc., who was served, but who has not appeared.

The Court: All right. Then the case will be dismissed against Air Cargo, Inc., Doe I, II, III, and IV, and the case will proceed only against the Trans World Airlines.

Mr. Wright: And Twentieth Century Delivery Service.

The Court: What is that?

The Clerk: And Twentieth Century Delivery Service.

The Court: Oh, Twentieth Century Delivery Service. All right. [13]

* * *

Mr. Wright: Yes, your Honor. I offer in evidence the stipulation executed this morning between the parties.

The Court: Now, the exhibits will have to be——

Mr. Wright: ——marked, your Honor.

The Court: You haven't attached them, so you will have to take the exhibits and introduce them in conjunction with this. So we will receive the stipulation as Plaintiff's [15] Exhibit 1, and I will take all your exhibits, your air bill, and other things, and we will give them consecutive numbers.

Mr. Wright: Your Honor, plaintiff offers in evidence, then, pursuant to the stipulation, one, the air bill.

The Clerk: First of all, the stipulation as to facts in the case is offered and admitted as Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit 1, and received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

In the United States District Court for the
Southern District of California, Central Division

No. 17927-Y

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., a Corpora-
tion; AIR CARGO, INC., a Corporation;
TWENTIETH CENTURY DELIVERY
SERVICE, INC., a Corporation; DOE I, DOE
II, DOE III and DOE IV,

Defendants.

STIPULATION

It Is Hereby Stipulated and Agreed, by and be-
tween the parties, through their respective counsel,
for the purposes of this suit, that:

The following, or copies thereof, may be admitted
into evidence:

1. Trans World Airlines, Inc., airbill No. 933916.
2. Trans World Airlines, Inc., tariff filed with
the Civil Aeronautics Board (or portion thereof)
as set forth in certified true copy dated April 28,
1955.
3. Contract dated April 1, 1952, between Air
Cargo, Inc., and Twentieth Century Delivery Serv-
ice, Inc.

It is further stipulated as follows:

1. St. Paul Fire and Marine Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota.

2. Trans World Airlines, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware.

3. Twentieth Century Delivery Service, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California.

4. Calnevar Company is a corporation organized and existing under and by virtue of the laws of the State of California.

5. On January 7, 1955, Trans World Airlines, Inc., tendered to St. Paul Fire and Marine Insurance Company the sum of \$122.50, in full settlement of its subrogation claim for alleged damage to the shipment carried under airbill 933916, and that said check was refused and returned to Trans World Air lines, Inc., on January 10, 1955.

6. Air Cargo, Inc., entered into an agreement with Trans World Airlines, Inc., whereby Air Cargo, Inc., entered into that contract dated April 1, 1952, between Air Cargo, Inc., and Twentieth Century Delivery Service, Inc.

It is further agreed that, if the same meets with the approval of the Court, the issue of damages may be tried separately.

/s/ GENE E. GROFF,

Attorney for Defendant Twentieth Century Delivery Service, Inc., a Corporation.

CRIDER, TILSON & RUPPE,
DONALD E. RUPPE,

By !s/ ROBERT D. BRILL,
Attorneys for Defendant Trans World Airlines,
Inc., a Corporation.

LILLICK, GEARY & McHOSE,
GORDON K. WRIGHT,

By /s/ ROBERT D. BRILL,
Attorneys for Plaintiff.

Admitted in evidence January 10, 1956.

Mr. Wright: The next is the air bill.

The Clerk: The next thing, a uniform air bill covering the shipment in dispute is offered as Plaintiff's Exhibit No. 2.

Is that admitted, your Honor?

The Court: It may be received.

The Clerk: Admitted in evidence as Plaintiff's Exhibit No. 2.

(The document referred to was marked Plaintiff's Exhibit 2, and received in evidence.)

The Clerk: You want these in this order, Mr. Wright?

Mr. Wright: This next (indicating).

The Clerk: A certified copy of the air freight tariff of TWA is identified as Plaintiff's Exhibit No. 3. Is it admitted, your Honor?

The Court: It may be received.

The Clerk: And admitted in evidence as Plaintiff's [16] Exhibit No. 3.

(The document referred to was marked Plaintiff's Exhibit 3, and received in evidence.)

Mr. Wright: This next (indicating).

The Clerk: A service contract with Air Cargo, Inc., is identified as Plaintiff's Exhibit No. 4. Admitted, your Honor?

The Court: It may be received.

The Clerk: And admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit 4, and received in evidence.)

Mr. Wright: Your Honor, there is one additional stipulation which counsel have agreed to, which has not been formalized in writing, and that is that the St. Paul Fire & Marine Insurance Company is subrogated to whatever rights in the premises belong to Calnevar Company.

The Court: It may be received. The stipulation will be received.

Mr. Groff: So stipulated.

The Court: I assume that appears from the pleadings, because you pleaded subrogation, and I didn't assume that that allegation is denied.

Mr. Wright: Yes, there is no issue on that, your Honor.

The Court: All right. Go ahead.

Mr. Wright: Your Honor, we now offer into evidence the [17] original deposition of Harold E. Sloier. The deposition is signed, but not before a

notary public, and the latter formality has been waived by agreement of counsel.

The Court: All right. It may be received.

The Clerk: Deposition of Harold E. Sloier has been identified and admitted in evidence as Plaintiff's Exhibit 5.

(The deposition referred to was marked Plaintiff's Exhibit 5, and received in evidence.) [18]

* * *

Mr. Wright: This is the deposition of Harold E. Sloier, which was taken in Los Angeles on December 15, 1955, pursuant to stipulation of counsel.

The examination was conducted by Mr. Gene Groff, who is at the counsel table, and representing the Twentieth Century Delivery Service:

“HAROLD E. SLOIER

“called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

“Direct Examination

“By Mr. Groff:

“Q. Mr. Sloier, you are now employed by Calnevar Company?

“A. Shore-Calnevar, Incorporated. [20]

“Q. They are successors to Calnevar?

“A. The Calnevar Company recently changed its name to the Shore-Calnevar, Incorporated.

“Q. In July of 1954 you were employed by them? A. Yes.

(Deposition of Harold E. Sloier.)

“Q. What was the nature of your employment with them at that time?

“A. Chief Engineer of the Calnevar Company.”

Mr. Wright then says:

Shall we stipulate that all objections as to the form of the question and responsiveness of the witness' answer are saved?

And that was stipulated by Mr. Ruppe and Mr. Groff.

* * *

Mr. Wright: Yes, sir.

The Court: However, counsel may make any objection they desire as these questions are brought before us, and we will rule on them. [21]

Mr. Wright: Yes, sir. Mr. Groff continues:

“Q. Mr. Sloier, are you an inventor, too?

“A. Yes. I have spent 20 years of my life in designing and developing coin-operating machines.

“Q. If I speak to you about a certain prototype automatic coffee vending machine that allegedly was damaged in July of 1954, you know of what I am speaking, do you? A. Oh, definitely.

“Q. Did you have anything to do with the invention of that machine?

“A. I was the designer of the machine.

“Q. Was it manufactured here or elsewhere?

“A. It was constructed at two places, you might say. One of them was at our previous plant at 1732 West Washington Boulevard, and one of them was in an engineering plant we had on a temporary

(Deposition of Harold E. Sloier.)

basis out in the Valley, in the San Fernando Valley, 4712 Van Noord Avenue.

“Q. You stated that you were the designer. Was there someone with Calnevar Company that was the inventor, if I may use that word?

“A. No. The patents on the machine and all rights were vested in myself.

“Q. Do I take it from that that you were the inventor or you acquired them? [22]

“A. Right, I was the inventor.

“Q. This machine that is concerned in this lawsuit, I notice, is a prototype. Do I take it from that it is the first one that was constructed?

“A. Well, a prototype in the terminology of the trade means a first-hand model machine, in other words, one that is not made by tools but made from drawings by hand.

“Q. When was the prototype finished?

“A. Well, I will have to rely upon my memory now. I would say approximately within the month previous to this accident, I think somewhere around in there.

“Q. You would say approximately June of 1954? A. It is possible.

“Q. After it was completed did you put it to test or see if it worked? What was your procedure there?

“A. Well, there are many procedures. We have them tested ourselves at the plant prior to completion. In other words, let me differentiate between

(Deposition of Harold E. Sloier.)

the term 'completion' and what we term an uncompleted machine.

"When an engineering machine or an engineering device is completed, in our terminology it is, after it has been licensed and the finalizing, which could be inclusive of testing, completed. In other words, the testing of the particular machine to make certain that this machine now [23] is a final device. There is probably a difference in what we are discussing. Are we talking now about a machine that is finished that we want to show somebody or are we talking about the point in which development work stopped and testing began?

"Q. Well, let me try and help you. It is alleged that on July 12th the machine was damaged.

"A. Yes.

"Q. So let's talk about a time prior to that.

"A. Yes.

"Q. This was a coffee vending machine?

"A. That is right.

"Q. Was this something new, a completely new type of machine?

"A. There was nothing of this nature, of this particular machine, theretofore on the market, in other words, nothing.

"Q. After the putting together of the machine, if I can put it that way, I would be correct, would I, that you ran coffee through it to see that it performed its functions? A. Oh, definitely.

"Q. Now, was that done approximately a month prior to July 12th?

(Deposition of Harold E. Sloier.)

“A. Well, actually the testing of this particular machine [24] began, oh, almost six months prior to that particular time.

“Q. Would I be correct that the putting together of the machine was completed approximately six months before July 12th?

“A. Yes, you could say so.

“Q. Then during that six months period you ran various tests to see if it would operate?

“A. That is correct.

“Q. Did those tests before July 12th include both factory tests and field tests to see if it would work?

“A. In an only prototype the engineering division or the engineering department of any company that manufactures or develops a machine of this type are reluctant to see it go out in the field in the hands of an unskilled person so we—put it this way—we had so much invested in this particular machine that the testing was under my personal supervision in our own factory.

“Q. I presume that you ran the first test and then you had to make adjustments or do further work on it?

“A. Well, this machine was made in a rather laborious way by hand, and during the time the tests were run, from the time the tests were run until the time the machine was taken on this trip back east, and which it [25] was the return from this trip that this machine had the accident, there were certain minor revisions made in the particular

(Deposition of Harold E. Sloier.)

machine, in other words, to finalize the design. You see, testing and the design run concurrently, hand in hand, I mean, although the testing is in process until you are actually to the point of saying that we are going to buy it off now, you actually aren't completed. But when this machine went to St. Louis on this particular trip it was all completed, I mean, all the testing had been done.

“Q. At the time the machine went to St. Louis was it finalized then? A. Absolutely.

“Q. How did the machine function? Did it come up to what you had anticipated in design and engineering? A. Oh, definitely.

“Q. What was the principle of the machine? I understand it vends coffee, but did it put cream in it and put sugar in it, or what did it do?

“A. Well, the principle of the machine is this: This is what we call a dry mix or a powdered machine, a coin-operated vending machine which vended a hot beverage. It had within the machine itself three canisters, one of them containing coffee, one of them containing powdered cream, and one of them containing superfine granulated [26] sugar. At the preselection of the customer to the machine he could either select coffee, coffee with cream, coffee with cream and sugar, at will, and upon insertion of a coin the machine would mix those ingredients and blend them together with water to his selection and deliver it in a paper cup.

“Q. You don't happen to have one of the machines at this plant where we are now, do you?

(Deposition of Harold E. Sloier.)

“A. No, we don’t. There are, of course, as you realize, a lot of coffee machines as such on the market today. This is not the only hot coffee machine ever made.

“Q. No, in developing your original prototype as you did it here, I imagine it is costly because it is hand labored; that would be correct, would it?

“A. Yes.

“Q. Can you tell us what the cost of developing the first one was?

“A. The whole entire machine to Shore-Calnevar?

“Q. Yes.

“A. Well, I don’t know how we can figure our overhead here at the plant so I am going to say exclusive of overhead, and so forth, which we have in this plant, if I were today to put my own money out to develop the machine I would have invested possibly between seventy-five and a hundred thousand dollars to bring the machine [27] around to the point in which this machine was at the time it went to St. Louis.

“Q. Now, after the prototype is finished and finalized do you use the physical prototype machine itself in your future production or do you work from dies or drawings you have drawn before?

“A. Well, this particular machine was a first model. The desire of the Shore-Calnevar Company and myself was to sell this activity. That is what this machine went back East for, went back for a showing and for sales. At the time this machine

(Deposition of Harold E. Sloier.)

was damaged we had planned showings in other cities on the particular machine, showings with the view in mind of doing either one of two things: Either sell it in toto with all the investment we had in it plus a reasonable profit to ourselves, or securing enough interest and orders in the particular machine to warrant us going into the production on that particular machine. That is the reason for the showing. The reason for the showing was to take this out and show this merchandise, and that is one reason why it was insured so heavily. We had so much on it, so much rested on this particular machine in regards to either getting orders to build the particular machine or interesting clients who would build it for us, either on an outright sale or a license or some other agreement of that particular [28] caliber.

“Q. Now, did you——

“A. I will tell you one thing more before we go on.

“Q. Yes.

“A. How much we at our end banked on this machine arriving undamaged. I mean, we had so much invested in it that Fred Plotkin, the president of our company here, bent backwards. I wanted to build a shipping crate for this particular machine. He wouldn't hear any of it. This is factual. Fred Plotkin and myself took his car, his convertible, put the top down and mounted this machine in blankets and drove it over like you would have a crate of eggs to Bekins Van & Storage Company

(Deposition of Harold E. Sloier.)

and they built a special crate for this machine to go to St. Louis. He wouldn't take my word for it that I could pad the crate. Bekins, he wanted them with all their experience to build this crate. The crate was made in such a way, all padded on the inside and the outside, so just by removing the screws in the front—it was not an ordinary shipping crate. This was a crate specially made to show this machine where you could take and put the machine back in the crate and take it out all padded like you would ship a piano. It was all screwed together and made out of heavy lumber.

“I want to bring this point forward. We placed so [29] much value on this particular machine that he wouldn't even allow me—and I have been in the coin-operating machine business for all the years of my life—he wouldn't allow me to crate it, it was so valuable. He took it down there himself and the president of the concern drove the car.

“Q. Is that the crate it came back from St. Louis in? A. That is the crate.

“Q. After it got back from St. Louis did you make showings of the machine after it was repaired? A. Pardon?

“Q. After the machine was damaged was the machine repaired after that?

“A. Oh, definitely.

“Q. Were showings made of it after that?

“A. The machine laid, I think, about four months or three months during the time it was being

(Deposition of Harold E. Sloier.)

repaired, and this is the unfair part of any machine of this caliber. We in the trade say a machine of this type has a shelf life. Once you show it to the trade, you see, you have now shown them your hole card. From there on in it is a race between the time you get in production and the time your competitors will pirate items from the machine which are advantageous to them. So during this time it [30] laid in this repair deal we could not show it and he canceled showings in several cities, Mr. Plotkin did. Finally this machine was sold at a loss, an actual loss, to someone else in this particular area.

“Q. It took four months to repair it, did it?

“A. Approximately four months to repair it.

“Q. You were working on it the whole four months? A. Yes.

“Q. At the time it was being repaired during that four months was the engineering and the drawings—I don’t know the business; whatever it took—could you have gone into production even though the prototype was damaged?

“A. It is doubtful, for this reason: When a new machine of this caliber goes into production and you have drawings on the machine and drawings are checked, why, it is a great aid, in fact, almost a necessity, that the tooling division or the people who are making the tools and dies on the particular machine or those who are going to fabricate and assemble this particular machine, have something tangible they can look at, something they can look at and say this part goes there and this part goes there,

(Deposition of Harold E. Sloier.)

and so forth. During that particular time you have to get bids and estimates and it is a difficult thing to get accurate bids and estimates off of drawings which are right down to actual cost, unless they can see what [31] this finalized part looks like, the machine looks like. So it is an essential thing in this type of assembly work where you have a very complex, complicated machine, that the machine be available with the drawings for both production and tooling for estimating.

“Q. Well, in such a procedure I presume you are talking about subcontracting out for your parts and they like to look at it with the drawings; is that right? A. That is correct.

“Q. They don’t take the actual parts with them to their plant, the subcontractors, do they; they just look at it here, don’t they?

“A. That is correct.

“Q. Now, with the damage on the machine there was nothing to prevent them from looking at the machine even though it was damaged along with the drawings, was there?

“A. Well, it is a very difficult thing to say, ‘We want the cabinet made like that except we don’t want it there and there and there,’ which would be the damaged points. In this type of business you have a very difficult thing or a very difficult—I will qualify it—a very difficult problem in going to another company, a large company, say, like Weber Showcase here in the city, and asking them for a bid on a particular machine and give [32] them a

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set of drawings and call them in to see the prototype and then say that the prototype does not necessarily reflect what you want them to do. You tell them you don't want the door to fit this loosely or you don't want the well to break down like this is. If you do that, you are leading with your chin. It is absolutely essential that we show them something that is right up to snuff, you might say, that we set a standard for them with.

“Q. The damaged machine was repaired, I understand? A. That is right.

“Q. Do you have any pictures or anything that show the damaged machine in its damaged condition? A. That I do not know.”

Mr. Wright: I might interject at that point, may it please the Court, I endeavored to find or get such photographs if they existed. Mr. Plotkin told me they did not. I agreed with counsel to furnish them if they were available.

The Court: All right.

Mr. Wright: Continuing with the deposition:

“Q. What did the damage consist of? Was it a visible type of thing or was it internal? I have never seen the machine.

“A. Well, I will put it this way: I personally assisted in the uncrating of this particular machine at [33] the Shore-Calnevar plant when it was returned from St. Louis after it was delivered to us. Upon removing the front—we had a dust wrapper that Bekins had supplied that fit over the whole machine so dirt and dust wouldn't get on it—when we

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removed the dust wrapper and looked at the machine the damage was visible. We didn't even uncrate the machine the rest of the way. We called the airlines. I wouldn't let a man take it out of the machine. I said, 'Leave it right there,' and then called the airlines. They arrived. It was Mr. Dalton, I believe——

"Mr. Ruppe: What was the name?

"The Witness: I am not sure of that name. I think it was Dalton.

"Mr. Wright: Wait a minute and I will give it to you if you want it. Do you want it?

"Mr. Ruppe: Yes.

"Mr. Wright: George J. Dalton, T.W.A. inspector, LAX. Apparently this report I have is dated 7/12/54, at 3:45 p.m.

"Q. (By Mr. Groff): Did Mr. Dalton come down then and inspect it? A. Oh, yes.

"Q. Do you know if he made a report on it?

"A. Oh, definitely.

"Q. Did he give you a copy of the report? [34]

"A. Yes, I believe the management has a copy of the report. I think they turned it over to our attorneys, I believe. Who has the report now, I couldn't say.

"Mr. Wright: I have what appears to be a carbon copy of the thing. Do you want to look at it? Would it help you, Mr. Groff?

"Mr. Groff: Yes, it might shorten our examination.

(Deposition of Harold E. Sloier.)

“Mr. Wright: This is T.W.A. form F-85-, called Air Freight Shipment Inspection Report.

“Mr. Groff: I would like to have this marked for identification at this time.

“(The document referred to was marked Defendants’ Exhibit A for Identification by the Notary Public and is annexed hereto.)”

The Court: Now, wait a minute. Is that already an exhibit?

Mr. Wright: No, Your Honor. That is attached.

The Court: Then we will have to give it a different number. Otherwise there will be confusion.

The Clerk: You had better take it out, Mr. Wright.

The Court: We had better take it out and give it a number. What will it be?

The Clerk: It will be No. 6.

The Court: No. 6, all right. We will take it out later and not interrupt the reading. [35]

The Clerk: Air freight shipment inspection report is marked, for identification, as Plaintiffs’ Exhibit No. 6. Received in evidence, Your Honor?

The Court: Yes, it may be received.

(The document referred to was marked Plaintiff’s Exhibit 6, and received in evidence.)

Mr. Ruppe: Mr. Wright, what page and line?

Mr. Wright: We are now on page 15, line 3.

The Court: I am sorry I mixed you up.

Mr. Wright: Mr. Groff continues:

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“Q. Mr. Sloier, this has been marked Defendants’ Exhibit A for Identification. Is that a copy of the inspection report that Mr. Dalton made that was given to you? A. That is correct.

“Q. I notice it has the outline of the damages on it. Did you go over those damages or possible damages, as they are stated?

“A. Those were visible things which we could ascertain at that particular time with Mr. Dalton.

“Q. You assisted Mr. Dalton in putting these things down? A. Oh, definitely.

“Q. And the extent that you could see at that time of the damage? [36] A. That is right.

“Q. At the time the report was made this was your best determination at that time of the damage to the machine?

“A. We could not go in and examine any concealed damage to this particular machine because neither he nor I had the time at that particular time to dismantle the machine to find out what was actually wrong.

“Q. I notice you state possible damage to motor or shafts and operating parts? A. Yes.

“Q. You did try and project what the possible internal damage was?

“We had to project what we thought it would be, yes. It was visible to the point you could see the whole inner shelf drooping and being the designer of the machine and knowing how it went together, I could anticipate trouble.”

The Court: I think the record should show that

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in offering this air freight shipment inspection report you are offering both sides, because you are examining the man as to notations made on the reverse of this instrument.

Mr. Wright: Yes. We have no objection, Your Honor, to both sides.

The Court: I mean, merely to show what you were doing. [37] Go ahead.

Mr. Wright: Line 9, Mr. Ruppe:

“Q. And these are the things you anticipated?

“A. Yes.

“Q. This is the only report you were given a copy of? A. That is correct.

“Q. This is the only report that you know of?

“A. To the best of my knowledge, I would say yes, it is the only one.

“Q. Was there physical evidence of damage to the crate when you first saw it? A. Yes.

“Q. What did it consist of?

“A. Well, our examination by Mr. Dalton and myself, the first thing we did after we saw the way the machine set in the crate itself, we pulled the machine out of the crate, examined the machine, as you see right here now. Then what we did was re-assemble the crate to see what damage was done to the crate. The easiest way for us to ascertain that was to put the crate front back on again. There were several parts in the upper part of the crate broken through and some of the side structure had screws that were pulled right out of the crate, but across the whole entire part of the crate it was all [38]

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covered with grease and mud. The whole front part of the crate was blackened and scratched from dirt and mud just ground into it. All over the crate was arrows saying 'Up.'

"Q. What do you mean by the front of the crate now?

"A. The part that you take off in order to have access to the machine.

"Q. That is where the screws held it on?

"A. Yes.

"Q. That was the only part that came off?

"A. Yes, and that was marked on the crate 'Front.' That was marked 'Front' on the crate.

"Q. What else did you observe?

"A. The arrows in the crate all around it saying 'This side up, Fragile.' The dirt marks were across the whole front of the crate. Scratches of the crate itself were noted at that particular time.

"Q. You have described on the front that there was the appearance of grease and mud?

"A. Yes, and scratches were dug right into the wood itself like it had been sliding along.

"Q. Let's leave the front of the crate now.

"A. All right.

"Q. Now, the sides and, let me say, the back, what [39] did you observe there? Were there scratches or what did you see?

"A. Merely some of the nails pulled loose in a particular place and the crate setting at a slight angle, which you would expect if a crate was dropped suddenly.

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“Q. Structurally the remainder of the crate, other than the front, showed loose nails, or something like that, but it was only the front that showed scratches, mud or grease; would that be correct?

“A. To the best of my knowledge at that particular time.

“One other thing I will qualify is this: If you will recall just previous to speaking about this front I explained about the top of the crate where we had noticed the cracks and the nails pulled loose. That is on the part which would be where the arrows are around the particular crate itself, in other words, arrows that said ‘This side up.’

“Q. That would be the up side?

“A. That would be the up side, that is right.

“Q. The crate was——

“A. It was not standing in its correct position.

“Q. ——about how big?

“A. I would estimate the crate to be 24 inches wide, 20 inches deep, and about 65 inches high. It was [40] made of three-quarter inch lumber and not of thin crating material.

“Q. Now, did this machine actually go into production eventually?

“A. This particular machine right now is at the point, I believe, of going into production by the people who purchased the machine.

“Q. Did you get any orders for machines at the St. Louis showing?

“A. Yes. We have a deal on the fire to sell the

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whole entire machine in toto to a company in St. Louis, which subsequently fell through due to the fact that we could not bring the machine back and we could not produce the particular machine for field tests which they wanted to make in the field.

“Q. This deal that you spoke of in St. Louis, I presume, was not actually consummated at the time this thing was damaged?

“A. We came back from St. Louis with a tentative arrangement.

“Q. Some details were to be worked out yet?

“A. Right.

“Q. The deal that you had in St. Louis was for a transfer of the physical machine and all your rights and patent rights and everything else? [41]

“A. Yes, based on tests made on the machine.

“Q. Now, who was that deal with, by the way?

“A. I believe that particular deal was with National somebody in St. Louis. Just who the rest of the company is, I couldn't say.

“Q. Now, in addition to this in St. Louis did you get orders for units themselves in St. Louis?

“A. That would be out of my province. I mean, I am not the one that would handle that. That would be handled by Mr. Plotkin, the president of this concern.

“Q. You do not know whether there were orders or not? A. No.

“Q. In your contemplated production or in the contemplated production from the time it was dam-

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aged, was it on a packaged deal to sell everything or were you going to build the units and sell them?

“A. I believe that was nebulous as far as I am concerned. I mean, it is a question which management alone could make a decision on. I was merely the engineer in this particular enterprise and the inventor of the particular machine, but negotiations in regards to dollars, and so forth, and the manner in which this machine would be fabricated or sold or partially sold, was solely within their province. [42]

“Q. Let me ask you this: As of today if there was a decision reached for your production would individual machines be sold at this time?

“A. No. This machine now is in the process of being tooled for production.

“Q. That is your own production?

“A. No, no, it is not. We sold this particular machine later on.

“Q. All right. You sold the use of the patent rights and everything else, all your rights in it?

“A. Yes.

“Q. Is that correct? A. Yes.

“Q. When was that sale made?

“A. Oh, I would say approximately six months ago.

“Q. At any time have you ascertained or run a cost or an estimate on the cost, production cost, of making the unit? A. Oh, yes.

“Q. How much would it cost to make the unit in production?

“A. Well, you have to qualify that question for

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me. Are you asking now how much each unit would cost and if so, what production quantities are we talking about? Or are you talking about what it will take in dollars to [43] tool this particular machine? Which of those three?

“Q. I am talking about the production of a unit that you are going to, let’s say, sell to a wholesaler, or however you distribute it?

“A. I don’t get the question, I am sorry.

“Q. All right, let me reask it. I am speaking of the production cost without tooling, that is, the cost to the manufacturer to start and end up with a finished coffee vending machine. How much would that cost be? A. Well——

“Mr. Wright: Excuse me. I think that is still a little confusing. You say without tooling.

“Q. (By Mr. Gross): Is it confusing to you?

“A. Yes.

“Q. All right, let me reask it.

“A. Let me explain something. Don’t take this down if you can help it.

“Mr. Wright: Do you want to get off the record a minute?

“Mr. Ruppe: All right.

“Mr. Groff: Yes.

(A discussion was had off the record.)

“Q. (By Mr. Groff): Ignoring the capital investment, in order to set up a production line, to make the question clearer, after that you have labor and materials [44] to go in?

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“A. That is right.

“Q. How much would it cost to produce one machine? Is that a fair question?

“A. To produce one machine from production tools?

“Q. Yes, all set to go.

“A. From production tools?

“Q. Yes.

“A. Mind you, now, I will outline a few things for you to qualify my answer to you. To produce one machine from production tools would encompass setting up all your punch presses, all your operations, to produce one machine. During the time they were producing that one machine, to run those punch presses another half hour might produce a hundred parts, so the cost of producing one machine, as a rule of thumb, would be equal to the production cost of 100 machines in a production run.

“Q. How much would that be?

“A. Oh, I would probably say you are talking about maybe \$35,000.

“Q. All right. If we ran a hundred machines, how much would it be? Would that still be \$35,000?

“A. Oh, no.

“Q. Well, I misled you on the question. If we ran the full 100 machines—withdraw the question. You have [45] answered the question.

“A. You are getting into a problem on a particular machine when you talk about production runs because it is one of those was-you-there-Charlie

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deals, who is doing the tooling, who is doing the punch press work, who is doing the assembly work, and what are we talking about?

“Q. You have an idea as to what the reasonable cost would be, though, don't you?

“A. The original cost based on—you asked about one machine. Now, my interpretation would be that if we had all the tools and were all set to go and we wanted to build one machine for those particular tools it would cost us \$35,000 to put that machine on the floor.

“Q. All right. Now, I have all the tools and I want to run 100 machines. How much does it cost to put each machine of the 100 on the floor?

“A. I would say above that you would probably add, if you are running a hundred I would add, in my interpretation, about, oh, \$500.00 a machine. You see, let me explain something to you gentlemen. I will give some information which you might not agree with or you might. The idea in back of this particular little machine which we developed was to design a machine that can be made in high production at a tremendously low cost. There is the Achilles heel of this whole deal. This machine was designed in such a [46] manner that on production runs of 10,000 or so, which it was planned for, this machine could be produced at a point and perform all the functions of machines which cost thousands of dollars to perform. This machine would probably sell in large quantity runs of 10,000 somewhere around maybe a half to a third of the price of that

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big machine but it did everything the big machine did. But its value lay only in production. Now, if you cannot afford high production tools to make this particular machine, the way it was made, being a precision machine, then of course, this particular machine in 100 lots might cost a fantastic sum with relation to other machines on the market. It was only based on the type of tooling you would have. It was not designed to be made in lots of one or ten or a hundred or a thousand.

“Q. But if you had the tooling and you ran a hundred, it would cost you approximately \$500 to put each unit on the floor?

“A. Above your \$35,000.

“Mr. Wright: That would be \$85,000, wouldn't it?

“The Witness: These machines, if you produced a hundred, would reasonably cost that much. \$850 apiece or more.

“Q. (By Mr. Groff): What was the \$35,000, the cost of tooling? [47]

“A. That would be the cost of setting all your dies up and all your plating processes up to plate one part, to fabricate one part, to stamp one part, and so forth all the way down the line.

“Q. Assuming, though, that you've got the thing tooled, when you set up you have to set a machine and get ready to go. Now, that is what the \$35,000 would be for; is that correct? A. Yes.

“Q. Now, with that being accomplished, ignoring that cost, you start with labor and materials

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beyond that to put the machine through and it would cost about \$500 per machine if you ran it in lots of 100?

“A. That is right, let me give you an example. Suppose I had a company here in Los Angeles bidding on a cabinet for this particular machine and they bid, say, \$35 to make a cabinet in lots of 5000. It is reasonable to assume they might charge as much as a hundred to \$200 a cabinet to build one cabinet after tooling.

“Q. During the four months period that this thing was being repaired, the prototype, what did you do, if anything, toward getting any production on a production line basis?

“A. Nothing much could be done.

“Q. Did you do anything? [48]

“A. Yes. We ran some costs analysis on the particular machine but the actual work in regards to placing it in production was at a standstill, you might say.

“Q. In running the cost analysis did you contact subcontractors? A. The best we could, yes.

“Q. Did you contact subcontractors so that you had cost analyses figures for the whole machine and all its parts during that four months?

“A. I won't venture a guess as to that. I know management was working on cost figures. You see, there is a line drawn between engineering as such of a company and the production division as such of a company. You naturally hear what is going on

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in the company because it is in the next room to you and you might know something is going on but the actual figures, and so forth, I do not have access to.

“Q. Whatever work was done in getting cost analysis, or whatever it was, that was eventually utilized in your present program of production, wasn’t it?

“A. I don’t believe so because all the work that was done here in the plant, all the work that was done in regard to planning as to what assemblies would go where and all the work that was done—we had bushel baskets of quotations on this particular machine made [49] which our purchasing department had gone out and gotten quotations on from three or four suppliers for a particular stamping or painting job—that went into the hundreds and hundreds and hundreds of parts. There were three hundred and some parts or more in this particular machine and there were quotations for each of the parts from at least three sources. When this machine finally ended up, when it was sold at a loss and it went down the drain, they would give us absolutely nothing for the work that was done.

“Q. Would it be a true statement that after you had done this work your theory on how it was going to be produced changed then?

“A. No, absolutely not. The only thing is that the people who bought the particular device said, ‘Your work that you have here now is valueless

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to us because it is a different system than we use in our plant.'

"Q. Then the bushel baskets of estimates that you got, those were obtained approximately during the four months period while the machine was being repaired? A. Oh, no.

"Q. Over what period were they obtained?

"A. Oh, they might have been obtained over a period of six or more months. [50]

"Q. That would be six months from the date of the damage?

"A. From the time we said, 'Now the machine is at a point where you can start getting quotations which have a basis of fact.'

"Q. Would I be correct that at least some of the subcontractors that furnished quotations came and looked at the machine even though it was in a damaged condition or was being repaired?

"A. Oh, some of those quotations were made prior to its going to St. Louis.

"Q. During the four months some of the subcontractors came and looked at the machine?

"A. I believe not at the machine, but I believe at our drawings. To look at the machine during that particular time would be difficult because the machine was in a state of disassembly, you might say.

"Q. But they were able to go ahead with their estimates just from the drawings themselves?

"A. The best they could, but not complete.

"Q. The machine was repaired in your own shop, you stated, didn't you? A. Yes.

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“Q. What was the cost of repairing the damage to the machine? [51]

“A. I couldn’t say in dollars because I wouldn’t be involved in that. I am merely going to rely upon my memory now. I would say somewhere around, oh, between eight hundred and a thousand hours, actual man hours.”

Mr. Groff: Your Honor, I believe I have to object to that on the basis of the witness’ own statement, that it wasn’t within his province, and it is not material and it is not proper evidence of damage, or repair cost for the machine, and I move it be stricken.

The Court: That will be denied, because the rule in California is that in proving damage, you can prove it either by showing—take in automobile cases, for instance, in order to show damage to an automobile, you can do it two ways. You can show what the automobile was worth before and after, or you can produce the cost of the repair.

Mr. Groff: I am not objecting to that, Your Honor, but it is the witness’ statement. The question was:

“Q. What was the cost of repairing the damage to the machine?”

And this is his statement:

“Oh, I couldn’t say in dollars because I wouldn’t be involved in that.”

And then he went on and made a further statement.

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Mr. Wright: Well, he spoke about man hours. [52]

The Court: That goes to the weight. He merely says that he is giving a general estimate, which goes to the weight. Overruled.

Mr. Wright (Continuing reading):

“Q. Can you convert that into dollars for me?

“A. It is a difficult thing to convert into dollars because to convert it into dollars I would have to know the manner in which our company here applies their overhead to labor figures.

“Q. Were there materials also that, of course, went into it? A. Oh, yes.

“Q. Do you know what the materials involved would cost?

“A. Well, there were materials, small fixtures, and so forth, which were reset up and small tools and dies which were again made to go back over the ground which we had already gone over. Oh, I would say a reasonable figure in there would be, oh, under a thousand dollars on the material and special tools that had to be made again and gone back over again.

“Q. After making the prototype, from what you have just said am I correct that at least some of the tooling was not kept intact?

“A. There was no tooling. These are hand set. When [53] I speak of tooling here I speak of a separate little soldering jig or welding jig or drilling jig made temporarily to make this one part. This is not tooling; these are handmade machines.

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“Q. There is a list of damages that you and Mr. Dalton tried to estimate when you saw the machine. This listing is on the back of Defendants’ Exhibit A for Identification. Can you recall of anything other than those things that are on there that you found were damaged after you got into the machine?

“A. I gave a complete list of the itemized parts, in other words, a complete itemized parts list of the damage of this particular machine, to management, but to recall them to mind right now, I don’t.

“Q. Would I be correct that somebody with Calnevar, which is now Shore-Calnevar, knows more about this end of it than you do; would that be a true statement?

“A. In operating the company on a dollar basis?

“Q. Yes. A. Oh, definitely.

“Q. Who would that be?

“A. Mr. Fred Plotkin. Mr. Fred Plotkin handles the administrative functions of the Shore-Calnevar Company.

“Q. Were there any changes made in the machine from the damaged prototype to the way the machine was [54] when it was repaired after the damage? A. No.

“Q. It was identical to the way it was before it was damaged?

A. Yes. There were certain things which to the eye, to the trained engineer, were not as good, but I will qualify it by saying this: They were not damaged to a point where I would say they were not

(Deposition of Harold E. Sloier.)

usable. There were certain items in the machine which were not claimed as damage whatsoever which were usable because it was obvious we could get by with them.

“Q. Functionally, when the machine was repaired it was in as good a shape as before it was damaged? A. That is correct.

“Q. Mr. Sloier, would you tell us what you can about——

“A. I am going to make this fellow say Sloier.

“Q. Pardon me. Mr. Sloier, will you tell us of your own knowledge what you personally know, saw or whatever it was, in connection with the delivery of the machine on the day you discovered the damage?

“A. Well, I returned from St. Louis by plane and this machine was returned on the following plane on T.W.A. Knowing that we had a schedule set up ahead of us for these various showings which we had for companies [55] here in California and other cities, when we arrived in Los Angeles I was given the assignment by Mr. Fred Plotkin, who had also been with me on the trip to St. Louis, to have an A. No. 1 job, and that was to trace this machine down and get it back to Calnevar here. So we began immediately calling and asking for delivery of this particular machine. We called T.W.A. and they told us what flight it was on and when it was arriving, and so forth, and the truck, and so forth, so we were practically waiting for that machine because

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we had a showing that afternoon in our plant of this particular machine to some Los Angeles business associates of Mr. Plotkin. They were to be here at our plant. We were rather concerned when the machine didn't arrive when it should have. It was delayed probably a little en route. When I was returning from—we have three plants in the particular area there and I don't recall whether I was returning from one of the three plants or what, but I was coming into the front entrance of our plant on Washington Boulevard when this truck drove up on the street. The back of the truck was, oh, about even with our driveway as I drove my car up there.

"I drove up and parked right in back of the truck with my own personal car and I could see that this was our machine in the truck which we were after. The delivery man was not there. The driver was inside the building, [56] but the machine was in the truck laying flat in the truck. In other words, the crate was laying down instead of being stood up on end in the truck, like this here.

"I went in to our information girl and the truck driver was standing there. He said he was from T.W.A. and he had a shipment. I told him to wait a minute and I would get a man to help unload it. It is about 30 feet from the information desk back to the main door of our place where our janitor was working. I asked the janitor to go out with me and help him take the crate off the truck because the driver was alone. I asked him to help him off with

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this machine. I told the driver, I says, 'Wait, I will get someone to help you with that machine.'

"By the time we walked back and the man had picked up a two-wheeled truck, our maintenance man or our janitor picked up a two-wheeled truck to go out in the street, by the time we got out our doors, which were opened, already the driver had let this machine off the back of the truck down on the street upside down. The machine weighed better than 200 pounds. He couldn't hold the whole machine so it come down on the street rather suddenly upside down with the arrows pointing down instead of up.

"So I told our maintenance man to wheel it into our [57] plant, but before we wheeled it in I asked the T.W.A. man, whom I believe was a T.W.A. man driving the truck, to assist our maintenance man in turning this crate right side up on the street.

"So we took it back into our plant right side up. It was right side down when he unloaded it himself off the truck. That drop was, I would say, four feet off of the truck. It was a high-back-end truck. When we got it back in there we uncrated it, removed the dust cover, and saw the damage to it.

"Q. Maybe this will help us a little bit. We can scratch the writing off of the back, if you wish. It is just the identification.

"Mr. Wright: That is all right. I take it this is a picture of the entrance?

"Mr. Groff: Yes. Would you mark that for identification, please?

(Deposition of Harold E. Sloier.)

“The Witness: Could I see the picture of our entrance?

“Mr. Groff: I am told that is what it is.

“The Witness: Yes, this is the picture of our entrance in which we came down with a small hand truck. The truck, by the way, for your information, was parked on the street right out next to—not this car, but next to a car, like this. He was double parked.

“Mr. Wright: He was double parked? [58]

“The Witness: He was double parked.

“Mr. Wright: Why don’t you mark it Defendants’ Exhibit B for Identification, the photograph we have been talking about?”

At this time, Your Honor——

The Court: Just a minute.

Mr. Wright: Your Honor, here is the photograph referred to in the deposition. May that be Plaintiff’s Exhibit 7?

The Clerk: Photograph marked—is it received, Your Honor?

The Court: It is received.

The Clerk: As Plaintiff’s Exhibit No. 7.

(The document referred to was marked Plaintiff’s Exhibit 7, and received in evidence.)

Mr. Wright (Continuing with the questioning by Mr. Groff):

“Q. This Defendants’ Exhibit B for Identification does, other than for the auto that is there and

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some other little article, fairly depict the position of the building and the door on the day of the accident, does it?

“A. Well, in general, yes, that is it.

“Q. Approximately in the middle of the picture there is a wide door. Is that the door you have testified to that you came out of? [59]

“A. That is the door I came out of with the hand truck, that is correct, but that is not the door the truck driver went into. He went into our office.

“Q. Where was the truck driver’s truck parked?

“A. He was double parked at a point probably adjacent to where you see that car right now. The back of his truck was about ten feet this side of our opening in the driveway.

“Q. There is a black little sports car, a foreign car, that shows on this Defendants’ Exhibit B for Identification? A. Yes.

“Q. The back bumper of that car, where would the rear of the truck be parked with relation to that?

“A. I would say the back of his truck was about at the point where the back of the bumper is.

“Q. Now, were you——

“A. Another thing on here, this here side of this picture over here——

“Mr. Wright: Indicating the right-hand side of of the picture?

“The Witness: The right-hand side of the picture—extended out in this picture is where I pulled my car in and parked here in back of him.

(Deposition of Harold E. Sloier.)

“Q. (By Mr. Groff): Then when you went into the [60] building when you first came back and saw the truck there, did you go in through these large doors that show on Defendants’ Exhibit B?

“A. Right.

“Q. Then you came back out those doors and another employee accompanied you and he had a hand truck? A. Yes.

“Q. When you first saw the truck when it was first visible to you when you were coming back out again, what did you see then? What was the truck driver doing and where was the crate?

“A. He was right in the process of taking the crate off by himself.

“Q. Was the crate over the end of the tailgate by then?

“A. It was at a point where it was just too late for us to holler stop. He was already in the process of bringing it down.

“Q. Now, in letting it down he never took his hands off of it, did he?

“A. Actually, the crate went right down between his fingers. He could never hold that 200 and some pounds alone.

“Q. Did you see him lose a grip on it?

“A. I can’t say that he lost a grip on it. All I [61] know is it came down very hard onto the ground. His hands were still on the crate, but whether he had lost his grip or whether he realized that he had taken on something that he shouldn’t have, I couldn’t say.

(Deposition of Harold E. Sloier.)

“Q. How was the crate laying on the truck? It is about 20 by 24 by 65 inches, as I recall your estimate of it? A. Yes.

“Q. Was it down so that the large part was flat on the truck, or how was it? What was its position?

“A. I could not say whether it was on the front or back but the crate appeared to be either on its front or back.

“Mr. Wright: On the long dimension?

“The Witness: On the long dimension. In other words, the crate had fallen down—not fallen down, but was laying down either this way or this way. It was not laying on its side, it was laying on its front or back.

“Q. (By Mr. Groff): So that would be the 20 or the 24 inch dimension?

“A. The 24 inch dimension and the 65 inch dimension would be laying flat on the truck bed.

Q. Then when it came off the truck and went down to the ground did it go down to the ground in that same position? [62]

“A. No, the crate came off of the truck like this here and it went down to the ground like this so the top of the crate, the part in which the arrows show up, was down. In other words, the normal crate was rotated 180 degrees upside down.

“Q. Where was the man with the pusheart when you first saw the thing drop down?

“A. Approximately right with me, just coming out of the doorway.

(Deposition of Harold E. Sloier.)

“Q. Was there anyone else there that you know of?

“A. Not to my knowledge. There might have been, but not to my knowledge. I mean, I couldn't say. We are a big plant and probably many people might have been around but I don't recall, anyway, to see.

“Q. You stated that you were the inventor of the machine and the patent rights were in your name? A. Yes.

“Q. Was there any arrangement between you and Calnevar in connection with the machine? Now, if I have confused you in the question——

“A. Yes, I think you have.

“Q. ——I will restate it. All right. Let me say this: Forgetting for a moment any arrangements you possibly had with Calnevar, it would be a fair statement that you were the owner of the patent rights and the machine [63] and you invented it?

“A. Yes.

“Q. Now, did anyone else have any interest in it besides you?

“A. Interest in the invention of the particular machine?

“Q. No, an interest in the machine itself, in the box that came down.

“A. Let me qualify something. The tangible items, the machine itself, you could say, is the property of the Calnevar Company.

“Q. That's what I want you to explain to me.

(Deposition of Harold E. Sloier.)

“A. The intangible things, the patents and rights of ownership of those patents, were mine.

“Q. All right.

“A. They had exclusive license on this particular machine. They were the exclusive licensee of this particular machine.

“Mr. Wright: That is, Calnevar was the ‘they’ you are referring to?

“The Witness: Calnevar. They had all the sales rights, the rights to manufacture and the rights to buy or sell or trade this particular machine at their will.

“Q. (By Mr. Groff): Now, to get directly to you, let’s talk about the prototype itself, the physical [64] prototype. A. Yes.

“Q. Who owned that?

“A. The physical prototype, I would say, is the property of the Calnevar Company. It was built at their expense. They paid for the entire expense of the particular machine being fabricated.

“Q. And you had an arrangement with them to that effect, I suppose? A. Oh, yes.

“Q. I am interested in the detail on the reproduction, the repair of the damage.

“Gordon, I would like to have a copy of what apparently is with Calnevar. I see no reason to take Mr. Plotkin’s deposition at this time if we could get a copy of that. I can’t speak for Don here.

“Mr. Ruppe: That is satisfactory.

“Mr. Groff: Do you suppose we could have a copy of that?

(Deposition of Harold E. Sloier.)

“Mr. Wright: Sure, if they have it and we can get it.

“Mr. Groff: Can we get it while we are here?

“The Witness: I doubt it.

“Mr. Ruppe: Off the record.

“(A discussion was had off the record.) [65]

“Mr. Groff: No further questions at this time.”

Mr. Ruppe then says, “I just have a couple of very short questions,” and the examination of the witness continues by Mr. Ruppe:

“Q. You have given us certain dimensions as to the size of the crate.

“A. Those are approximate dimensions.

“Q. Could you give me the approximate size of the machine itself?

“A. Well, you see, now, to an engineer what I have to do is reverse it around. What I have to do is pick up the actual size of the particular machine itself and then add mentally the crate dimensions to it because the dimensions I gave you for the crate are approximate. That might change to a degree the size of the particular crate. If I recall, to the best of my knowledge, our machine was about 14 and one-half inches deep by about 20 inches wide, by approximately 62 inches high. That's about the size of the machine. Now, obviously that might conflict slightly with the size of the crate. There was about two inches of crating and padding material between the machine and the outside of the crate.

(Deposition of Harold E. Sloier.)

“Q. Approximately what did the machine itself weigh?

“A. Oh, I would say somewhere around 125 pounds. [66] This machine, I would say, was somewhere around in there.

“Q. Did you ever have a photograph of the machine, a picture of it?

“A. I imagine management has, you know, for advertising, and so forth. I do not have it here myself, no.

“Mr. Ruppe: That is all.

“Mr. Groff: I have a couple of more questions.

“Direct Examination

“(Continued)

“By Mr. Groff:

“Q. Did you eventually show the machine after it was repaired?

“A. Gee, that I couldn't say. I mean, after the particular machine was repaired and put together again, this company merged with the Shore-Cal-nevar Company and from then on the deals which they had I was out of touch with.

“Q. Do you know where the machine is now?

“A. Yes. I believe the machine now is, plus a lot of other parts, over at, I believe, Utility Appliance, or something like that, that we sold it to, I think.

“Mr. Wright: I don't know.

“The Witness: I don't know. I think it is Utility Appliance.

(Deposition of Harold E. Sloier.)

“Q. (By Mr. Groff): At this time is the prototype [67] machine that was damaged the only finished machine in existence——

“A. Well, I——

“Q. ——so far as you know?

“A. ——can’t say. The machine now has been cannibalized. What I mean by ‘cannibalized,’ is I think the machine has been entirely torn apart and rebuilt with some added features in it. I understand they might have put hot chocolate or something else in it, by the people who bought it.

“Q. So far as you know, the prototype, though, as it existed, is the only one of that type that is in existence now? A. Yes.

“Mr. Groff: I have no further questions.

“Mr. Ruppe: That is all.

“Mr. Groff: I will stipulate the deposition may be signed before any notary public.

“Mr. Ruppe: So stipulated.

“Mr. Wright: So stipulated.”

The Court: All right.

Mr. Wright: Your Honor, reserving only leave to go ahead tomorrow morning on the question of damages, the plaintiff rests at this point.

The Court: All right. [68]

The Clerk: The deposition, Your Honor, that was marked as Plaintiff’s Exhibit No. 5, may that now be admitted in evidence?

The Court: It may be received.

The Clerk: Plaintiff’s Exhibit 5 admitted in evidence.

The Court: Now, gentlemen, we have only a few minutes left. These young men will probably begin strolling in, and we have made good progress, so I will not ask you to make your motion to dismiss now, but let him offer evidence in the morning, and then you can make your motion to dismiss, just like a motion for a non-suit. It is in the same field, that is, that the plaintiff has not proved a claim, and then I will tell you at the time whether I want any argument on the matter or not.

So we will recess at the present time. We could not achieve very much in fifteen minutes, and we will recess until tomorrow morning at 10:00 o'clock, and you gentlemen instruct your witnesses to return.

(Whereupon, at 11:45 o'clock a.m., Tuesday, January 10, 1956, an adjournment was taken until 10:00 o'clock a.m., Wednesday, January 11, 1956.) [69]

Wednesday, January 11, 1956—10:00 A.M.

The Court: Are there any ex parte matters?

(No response.)

The Clerk: Case No. 17927-Y, St. Paul Fire & Marine Insurance versus Trans World Airlines, et al., further trial. Mr. Gordon K. Wright for the plaintiff, Mr. Donald E. Ruppe and Mr. Robert D. Brill for the defendant Trans World Airlines, and Mr. Gene E. Groff for the defendant Twentieth Century Delivery Service.

The Court: All right, gentlemen, everything is out of the way, and we can continue the trial.

Mr. Wright: Thank you, sir. With the permission of the Court, then, I would like, on behalf of the plaintiff, to briefly go ahead with our damage proof.

The Court: Certainly. That is all right.

Mr. Wright: Mr. Clark, will you take the stand, please?

The Court: You said you wanted to rest, but I explained I would rather not let you rest, but complete your proof.

Mr. Wright: Yes, sir.

DONALD OWEN CLARK

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your full name, sir? [71]

The Witness: Donald Owen Clark.

The Clerk: With an "e" on the end?

The Witness: No "e."

The Court: As a matter of fact, we already have in the deposition the fact of the handling, the dropping by the man who handled it, and then some testimony as to the nature of the damage. He described it.

Mr. Wright: Yes, sir.

The Court: Then a general appraisal of the need for the repairs, and the value, so we might as well complete it.

Mr. Wright: Yes, sir.

Direct Examination

By Mr. Wright:

Q. Mr. Clark, were you employed by the St. Paul Fire & Marine Insurance Company during the period from April of 1954, to January 1st of 1956?

A. Yes, I was.

Q. During that period did you have any occasion to deal with a loss involving the Calnevar Company, a corporation?

A. I did.

Q. Did it come within the course of your duties to approve the payment of that loss?

A. Yes, it did.

Mr. Wright: Would you mind marking this? [72] I understand, Your Honor, there will be no objection to these documents.

The Court: All right.

The Clerk: A sworn statement in proof of loss is marked, for identification, as Plaintiff's Exhibit No. 8.

(The document referred to was marked Plaintiff's Exhibit 8, for identification.)

The Court: All right. Let's go on, gentlemen.

Mr. Wright: Thank you.

Q. This Plaintiff's Exhibit 8, which I show you, Mr. Clark, is that the sworn proof of loss which you took in connection with the Calnevar loss?

A. That is.

Q. I note that on the reverse of this Exhibit 8 there is a breakdown of items of expenditures. Was that attached to the proof of loss at the time that you received it?

A. It was.

(Testimony of Donald Owen Clark.)

Q. And the item of \$7,725, as shown on Exhibit 8, is for the physical damage, and the additional item of \$1,931.25 is an additional 25 per cent of the original sum that I spoke about, which, added together, makes a total sum of \$9,656.25; is that right?

A. That is right.

The Clerk: Do you offer this in evidence, Mr. Wright?

Mr. Wright: Yes, I offer that in evidence as Exhibit 8. [73]

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 8, heretofore identified, admitted in evidence.

(The document heretofore marked Plaintiff's Exhibit 8, was received in evidence.)

Q. (By Mr. Wright): Mr. Clark, prior to approving the payment of that loss to the Calnevar Company, did you satisfy yourself that, in your opinion, it was a reasonable and proper claim?

A. Yes, we did.

Q. Did you personally issue the draft in payment of the loss or sign the draft? A. Yes, I did.

Q. Did you thereafter receive from the Calnevar Company a subrogation receipt showing that payment? A. Yes, we did.

Mr. Wright: Would you mark that, please?

The Clerk: The subrogation receipt is marked as Plaintiff's Exhibit No. 9.

(The document referred to was marked Plaintiff's Exhibit 9, for identification.)

(Testimony of Donald Owen Clark.)

Q. (By Mr. Wright): Mr. Clark, I show you that subrogation receipt, and ask you if that is the receipt you received for the payment to Calnevar Company of the \$9,625.25?

A. That is that subrogation receipt. [74]

Mr. Wright: We offer that in evidence, may it please the Court?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 9, heretofore identified, admitted in evidence.

(The document heretofore marked Plaintiff's Exhibit 9, was received in evidence.)

Mr. Wright: I have no further questions, Your Honor.

Cross-Examination

By Mr. Groff:

Q. Mr. Clark, did you ever see the machine itself?

A. Yes, I did.

Q. Where did you see it?

A. At Calnevar's warehouse.

Q. And approximately when?

A. I would say approximately ten days to two weeks after the first notice that it was damaged was received by the company.

Q. Are you familiar with the type of repairs that were done in connection with this machine?

A. No, I am not.

Q. Do you have any knowledge as to—personally have any knowledge as to the reasonable cost of making such repairs? [75]

(Testimony of Donald Owen Clark.)

A. We relied on experts.

Q. And if I am correct, you relied on Mr. Graham, didn't you? A. Correct.

Q. The payment that was made and the proofs that were issued by the St. Paul were made and issued pursuant to Mr. Graham's report, weren't they? A. Correct; his recommendations.

Mr. Groff: Counsel, may we use the photostat, or do you have the original?

Mr. Wright: Yes. I have perhaps a better copy of Mr. Graham's report. Although it is not the original, it is signed.

Mr. Groff: May we have a stipulation, counsel, that this copy may be used in lieu of the original?

Mr. Wright: Yes, for all purposes. So stipulated.

Q. (My Mr. Groff): Mr. Clark, I show you a report of Mat Graham Co., dated August 13, 1954, and ask you if that is the report upon which the St. Paul based the adjustment of this loss?

A. That is the report.

Mr. Groff: I would like to offer that in evidence at this time.

The Clerk: Defendants' Exhibit A, a report of Mat Graham Co. is identified and has been offered in evidence, [76] Your Honor. May it be received?

The Court: It may be received.

The Clerk: Defendants' Exhibit A, identified and admitted in evidence.

(Testimony of Donald Owen Clark.)

(The document referred to was marked Defendants' Exhibit A, and received in evidence.)

Q. (By Mr. Groff): Mr. Clark, I notice from Mr. Graham's report that he says, "Based upon volume production the machine could be made for \$600 to \$700 each."

Other than that investigation, did the St. Paul make any other inquiry as to the value of the machine?

Mr. Wright: I will object to that as being incompetent and irrelevant, Your Honor.

The Court: Overruled. Go ahead.

The Witness: Repeat your question, please.

Mr. Groff: Would you read the question, please?

(The question was read.)

Mr. Wright: Your Honor, I must further object that the question is compound, vague, and indefinite.

The Court: Oh, no. Overruled. It is testing the circumstances around the approval of the claim, and the fixing of the damages in a certain amount.

The Witness: Mr. Graham was talking about, I believe, two separate machines, when he speaks of one on a mass production basis can be turned out for \$600. This machine that [77] was damaged was a prototype machine.

Q. (By Mr. Groff): Let me ask it this way to you, Mr. Clark: Was the payment that was made

(Testimony of Donald Owen Clark.)

by the St. Paul based solely on Mr. Graham's report that is in evidence here?

A. We relied on him as an expert, yes.

Q. Now, what value did the St. Paul rely on as the total value of the prototype machine?

The Court: The statement gives the value at \$75,000 on the face of it. The witness may not have seen that. He should be shown that.

Mr. Groff: In this? I am looking at Mr. Graham's report, Your Honor.

The Court: All right. You are looking at Exhibit A?

The Clerk: Yes, Defendants' A, Your Honor.

The Court: Go ahead. You may answer it.

The Witness: Are you making reference to their actual cost in developing the machine to the stage that it was at the point that it was damaged?

Mr. Groff: No, I am——

The Court: No, he is asking—read the question, please. The question is very plain. He is talking about valuation, what value did you rely on as the value of the machine as a whole.

The Witness: Because, by its nature, being prototype, there is nothing to compare this machine to, so it would [78] be——

The Court: Now, we know what the dictionary word "prototype" is. What does "prototype" mean in that particular situation?

The Witness: This machine was the only one of its kind, that our assureds had drafted, designed and constructed this particular machine, and I as-

(Testimony of Donald Owen Clark.)

sume that they would be searching for a patent on this.

The Court: It was a model?

The Witness: Correct.

The Court: Of a type which would have to be produced in quantity in a different manner?

The Witness: Correct.

The Court: I see.

The Witness: Assembly type production.

The Court: All right.

Q. (By Mr. Groff): Did you know at the time of this payment, Mr. Clark, that the machine in a finished form had been sent to St. Louis for showing? A. I did.

Q. Did you know that Calnevar at this time had drawings from which this machine could be produced on a production basis?

Mr. Wright: I will object to that as assuming a fact not in evidence. The testimony is all contrary to that, [79] that they could have made it in mass production from drawings.

The Court: That is all right. They don't have to accept the statement in the record. Overruled. In other words, they want to see if the insurance company was gullible. Overruled. Go ahead.

The Witness: Yes, I am thinking.

The Court: You are thinking. That is all right. I won't interrupt the process. So few people do that, and it is considered dangerous to think these days.

The Witness: Quite some time has passed since the loss was adjusted.

(Testimony of Donald Owen Clark.)

The Court: Go ahead.

The Witness: You had better reread the question, I think.

(The question was read.)

The Witness: No.

Q. (By Mr. Groff): The St. Paul, as far as you know, made no inquiry along that line?

A. Here, again, it went to the hands of the independent adjuster who was handling the loss in our behalf, and it was his duties to develop all aspects of it. And I can't positively state that he did or did not. I feel safe in saying I believe he did.

Q. Mr. Clark, it would be a true statement, a fair statement, wouldn't it, that the only value, total value of [80] the machine, that the St. Paul relied on was the cost of repair—was the cost of construction? A. Reconstruction.

Q. Now, construction originally?

A. That involves engineering time, and so forth, of which I understand there was quite an astronomical figure, nowheres in relationship to what was extended in this payment.

Q. Perhaps I have confused you with the question. Let me reask it. A. Yes.

The Court: Wait a minute. This payment was on a policy of insurance?

The Witness: Correct.

The Court: On damages, that you had written?

The Witness: Correct.

(Testimony of Donald Owen Clark.)

The Court: And what was the maximum allowed?

The Witness: Could I see the policy?

Mr. Wright: Yes, Your Honor, that statement is on the proof of loss.

The Court: What?

Mr. Wright: That is right before us here on the proof of loss.

The Court: Is that where the \$75,000 appears?

Mr. Wright: The \$75,000 is the amount of——

The Witness: The limit of liability. [81]

The Court: The limit of liability. In other words, let me ask you this question: Isn't it a fact that insurance companies try to approximate the value of a thing they insure——

The Witness: That is correct.

The Court: ——before they write a policy?

The Witness: Correct.

The Court: Isn't that true?

The Witness: That is the underwriter's duties.

The Court: What?

The Witness: That is the underwriter's duties of the company.

The Court: That is right. In fact, sometimes you will ask for a survey of a home——

The Witness: Of appraisal, correct.

The Court: ——before you renew a policy, to see if the property has deteriorated. You don't just take a man's word for it. When he says, "Look, I have got a piece of machinery which is worth \$75,000, and I want it insured against loss in that

(Testimony of Donald Owen Clark.)

amount"? You would be broke before long if you did that, wouldn't you?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Groff): Mr. Clark, in this case did the St. Paul make an appraisal of this machine before they wrote [82] the policy?

A. I can't answer that question. That was the underwriting department's activities.

Q. Mr. Clark, does the St. Paul make appraisals of complicated machines like this before they write a policy?

A. I am a loss adjuster, and that, again, is an underwriting matter.

Q. Who is your underwriter?

A. Gordon Rennie.

Q. Mr. Clark, I notice on Mr. Graham's report that he has set out several alternatives in the payment of this claim. Apparently, one of the alternatives that was selected was not necessarily the lowest amount. Can you explain that to us?

A. I believe that reason was because the policy had an expediting clause in it, whereby 25 per cent, in addition to the amount of loss, would be paid. So, therefore, they took the category that would involve the least time, so that the expediting condition or 25 per cent would not be any greater.

Q. Let me look at that with you. I believe the expediting is handled separately. I refer you to page 3 of Mr. Graham's report, where he comes out at \$6,865. I refer you to No. 3, in which he comes out

(Testimony of Donald Owen Clark.)

at \$7,725 on page 4. From the schedule of loss I have I note that you [83] appear to have used the \$7,725, in lieu of the figure set forth under 4, on page 3, which is lower. What is the explanation for that?

A. I think Mr. Mat Graham can, and would be able to re-explain that for us. It was explained by that adjuster, who handled that particular adjustment, and I can't specifically recall the reason, but a reason was given, and it was agreed that that was the best procedure to follow.

Q. You elected to pay the \$7,725, as set forth in Graham's report; that is correct?

A. That is correct.

Q. And the expediting you speak of, that is in addition to the amount that was ascertained by Graham's report for repairs; isn't it?

A. That is correct, and I——

Q. And that is an arbitrary figure that is based on an equation set up in your insurance contract, isn't it?

A. That is correct.

Q. And there was no investigation made by you whatsoever as to what the value of the loss of use of the machine was, was there?

A. It was predetermined by the policy contract.

Q. You paid off on the basis of the contract alone, without any basis in fact, as developed from the loss itself; that is a correct statement, isn't it? [84]

A. You mean insofar as the loss——

Mr. Wright: I will object to that, unless you are referring to——

The Court: No, that is not a correct statement,

(Testimony of Donald Owen Clark.)

because the Graham report shows that these men are civil engineers, and mechanical engineers, and they made a very minute and detailed report showing the \$7,725 to be the actual physical damage. So it isn't a fair question. * * *

Mr. Groff: I am awfully sorry, Your Honor. I think you might have misunderstood me. I was talking about the nineteen hundred odd-dollar item down there.

The Court: I am not talking about that. You ask him about the entire amount that they paid, and you didn't segregate that, the \$9600. If you want to ask a question as to the \$1900 being a formula, yes. But the way you asked it, it intimated there was no investigation of any part of it.

Mr. Groff: I am awfully sorry, Your Honor.

The Court: When you have a report of men registered—it is very remarkable. Look at it. They are registered in all three professions, civil engineer, electrical engineer, and mechanical engineer. [85]

Mr. Groff: I know them, Your Honor, and they are very good.

The Court: Even if they are not here, I respect men of that type, and this isn't some appraiser who goes around and tries to look over a piece of property that has been burned, and make an appraisal. These are technical men who are licensed by the State of California, who make a report.

* * *

Mr. Groff: Let me reask the question:

Q. Referring to the \$1931.25 item, Mr. Clark, is

(Testimony of Donald Owen Clark.)

it true that that item was paid purely on the basis of a formula set up in the policy?

A. It was paid in accordance with the agreed conditions of that policy, that the company would do that; that in the event that the loss was X-dollars, it would pay 25 per cent above that X-dollars.

Q. And concerning the \$1931.25 item, so far as you know, no further investigation was made as to the factual basis for the loss of use applying to that item?

A. It was contractual in the policy.

Q. Contractual only? [86] A. Correct.

Mr. Groff: I have no further questions.

The Court: All right.

Mr. Wright: Thank you, Mr. Clark.

The Court: Read the last question and answer. You know, gentlemen, I am also chief judge, and in order to carry on trials, nevertheless I have to pay attention to other things. The bailiff brought me a note, and I had to look at it, so I want to be sure I caught the implication of the last question. I caught the first one, that he based it on the basis of the formula which called for 25 per cent over and above the actual cost. But read the last one to me, please.

(The record was read.)

The Court: I missed that last one, which was a repetition of the same thing.

(Witness excused.)

Mr. Wright: The plaintiff rests, your Honor.

The Court: All right. Proceed, gentlemen.

Mr. Groff: If it please your Honor, at this time, on behalf of the defendant Twentieth Century, the defendant Twentieth Century moves for a dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief in this action.

By the evidence, and by counsel's statement, the crux of this problem, your Honor, is whether the limitation under [87] the Air Freight Rules Tariff, it applies to damage if damage is occasioned while in the hands of Twentieth Century in this instance.

The problem is whether by the Air Freight Rules Tariff, and by these facts the limitation as filed is applicable.

In evidence is the contract between Air Cargo and Twentieth Century. By stipulation, this contract was made pursuant to an arrangement between TWA and Air Cargo.

This contract provides that Air Cargo was acting as agent for certain airplane companies, air carriers, among them TWA, and the contract provides that Twentieth Century is to be a ground carrier, performing a pickup and delivery service for and on behalf of TWA.

Going to the Air Freight Rules Tariff, Section No. 3.1(c) of the Air Freight Rules Tariff No. 1-A, in evidence, provides in part as follows—

The Court: Just a moment. Let me interrupt you. I merely wanted you to state the grounds. I am not going to decide it upon the motion to dismiss. I want all the evidence in. [88]

Mr. Groff: Let me just amplify the grounds a little, then, your Honor.

The Court: All right.

Mr. Groff: On the grounds that the facts and the law establish that Twentieth Century was rendering delivery service for a carrier at the time the damage occurred, if any damage occurred, and are entitled to the benefit of the limitation by Air Freight Rules Tariff.

The Court: I don't want to argue this. As I told you, I don't want argument, but I am not very much impressed by your argument, because that is made for the benefit of the shipper, not for somebody whom they use as their agent. The limitations are not made for the benefit of those whom they use. [92]

* * *

I am giving you now merely an illustration. I will let you argue it, but it is my custom always to give my first impression. I got the drife of it from what was said here yesterday, what the discussion would be, and from the pretrial memorandum, and it is my view that that limitation was for the mutual benefit of the shipper and TWA, that that did not blanket the people they may employ for transporting on land the freight after they had landed it, because in the law of insurance transportation by air freight is a high risk. It is a very expensive process. I know, because we paid \$40 to transport a dog from here to my little granddaughter, whose father is a professor at the University of Illinois, to Urbana, Illinois. When those are the rates that you

charge, then you can't extend the benefit of a contract like that to persons who act on land, unless the language is very clear and specific.

Mr. Groff: I believe the language of the Air Freight Rules Tariff is specific, your Honor, right to the point.

The Court: All right, read it now. So long as I told you what my reaction was, read the portion you have in mind.

Mr. Groff (Reading):

"The airbill, and the tariffs applicable to the shipment shall apply at all times when the shipment is [93] being handled by or for the carrier, including air transportation by the carrier and pick-up, delivery and other ground services rendered by the carrier or any other person performing for the carrier, such pick-up, delivery or ground services in connection with the shipment."

The Court: All right. The question then arises on what basis it is. We are back to the question that I handled in the State of Oregon, whether they were independent contractors, doing that upon that basis, or whether they were agents of the company. We will argue that. It is an arguable point.

So the motion will be denied. [94]

* * *

WALTON ROLLAND MANUEL

called as a witness on behalf of the defendant Twentieth Century Delivery Service, Inc., having been first duly sworn, testified as follows:

The Clerk: What is your full name, sir?

The Witness: Walton Rolland Manuel.

The Clerk: W-a-l-t-o-n? [95]

The Witness: Yes.

The Clerk: R-o-l-a-n-d?

The Witness: Two "l's."

The Clerk: And the last name is?

The Witness: M-a-n-u-e-l.

Direct Examination

By Mr. Groff:

Q. Mr. Manuel, what is your present occupation?

A. I drive a truck for Twentieth Century Delivery.

Q. And you were so employed in July of 1954?

A. Yes, sir.

Q. You had occasion in the course of your employment to make delivery of a certain object to Calnevar on Washington Boulevard?

A. Yes, sir.

Q. That was about July 12th, was it?

A. Yes, sir.

Q. Would you state to us what happened, as you drove up and made—from the time that you drove up in front of the Calnevar plant on Washington on that day, and made delivery?

A. Well, first, there was no place to park next to

(Testimony of Walton Rolland Manuel.)

the curb, so I double parked, as near to what I thought would be the receiving door of Calnevar, in that they had several different places where they did receive. [96]

After parking, I went in the office to find out if this was the particular place where the merchandise would be unloaded.

I talked to the girl at the switchboard. She called some man, or the man came by. It seemed to be in his category—what I had to deliver was along his line, so he took the airbill, and said, “This is where it would be delivered.”

So he asked me what kind of a—what I had to bring it in with.

I told him I had a two-wheel hand truck.

Well, he said, “I will get somebody to get a four-wheel dolly, and help you bring it in.”

So I went back out to my truck, slid the case over more or less to the middle of the truck. Being a long case, I eased it out to the back of the truck, set it up, set it up straight, straight up and down, the long way up, and while I was still standing there, waiting for this man and the dolly to come out, I noticed that I had unloaded it upside down, the arrows were pointing down.

So while I was still waiting for them to come out with the dolly, I laid the crate down, and set it back up. And when I had done all this, these two men were coming out, then. They were approximately on the sidewalk, or coming down the ramp, sort of the driveway approach at the time.

So there was nothing more said, but the man

(Testimony of Walton Rolland Manuel.)

asked me [97] if we would help—if we would put this on the four-wheel dolly, and asked if I would help take it inside. So we just put in on the dolly, and took it inside. I had a sig—a man to sign it, no complaints, and nothing was said about unloading, or damages at the time.

Q. Did you leave the premises, then?

A. Yes, sir.

Q. Where was the crate at the time you last saw it on the premises?

A. Well, it was sitting inside of the Calnevar plant, somewhere down this driveway. I would say, approximately, probably fifteen or twenty feet inside the building.

Q. Was it on or off the dolly?

A. It was still on the dolly.

Q. Where had you picked the crate up?

A. At the Twentieth Century dock.

Q. Did you have other deliveries to make before you made the delivery to Calnevar?

A. Yes, sir.

Q. During the time that you left the Twentieth Century dock to the time that you reached the Calnevar plant, did you or did you not have any unusual incidents in connection with the driving of your car?

A. No, sir.

Q. Do you recall having any rough roads, or hitting [98] anything?

A. No, sir.

Mr. Groff: Your Honor, might I have the airbill exhibit, please?

The Clerk: The airbill is Plaintiff's Exhibit No. 2 (handing document to counsel).

Q. (By Mr. Groff): Mr. Manuel, you mentioned about an airbill, and I show you Plaintiff's Exhibit No. 2, and ask you if that appears to be a copy of the airbill that you presented for signature at Calnevar?

A. Yes, sir.

Q. And you took one of those. What did you do with your copy?

A. The original copy I returned with the signature back to—which this looks like—back to Twentieth Century, which in turn is returned to TWA.

Q. And I note it is stated, "Received in Good Order and Condition, Except as Noted on Reverse Side, consignee Calnevar Co.," and there is a signature there. Can you identify the signature for us?

A. That is the gentleman that assisted in taking the crate inside.

Q. I show you Plaintiff's Exhibit 7, which is a picture, and ask you if you can identify that for us?

A. Yes; that is the drive which we pushed the dolly in. [99]

Q. And where was your truck parked in relation to the only black car that shows in the left-hand corner of that picture?

A. Well, my—the back of my truck was approximately even with the driveway; just enough to clear the drive.

Q. On the truck that you were driving that day, did you have any names or signs painted on it? Did you?

A. It said, "Twentieth Century Delivery."

Q. Anything else on it?

A. It has, I imagine, an I.C.C. number. I think so.

Mr. Groff: I have no further questions.

Mr. Wright: I have no questions of the witness, your Honor.

Mr. Brill: I have no questions, your Honor.

The Court: All right.

(Witness excused.)

Mr. Groff: I will call Mr. Miller.

JEROME M. MILLER

called as a witness on behalf of the defendant Twentieth Century Delivery Service, Inc., having been first duly sworn, testified as follows:

The Clerk: What is your full name, sir?

The Witness: Jerome M. Miller.

The Clerk: J-e-r-o-m-e M. M-i-l-l-e-r? [100]

The Witness: Right.

The Clerk: Thank you.

Direct Examination

By Mr. Groff:

Q. Mr. Miller, what is your present occupation?

A. Superintendent of Twentieth Century Delivery Service.

Q. Was that your occupation in July of 1954?

A. It was.

Q. And Twentieth Century is a delivery service, isn't it? That is your business?

A. Yes, sir, pickup and delivery.

Q. Now, in connection with your business, do you make deliveries for certain airlines?

A. Yes, sir, we make deliveries for all of the major scheduled airlines in Los Angeles.

(Testimony of Jerome M. Miller.)

Q. And do you make deliveries for TWA?

A. Yes, sir.

Q. Would you explain to the court your procedure in receiving your orders and making your pickups and your deliveries in connection with TWA?

The Court: Let's find out, first, how the relationship is established. Do they contract, or do they work by the piece, or what do they do? That will become very important. [101]

Mr. Wright: Your Honor, may I invite the court's attention to the contract, which is in evidence, governing the relationship of this party. That is Plaintiff's Exhibit 4 in evidence, by stipulation.

The Court: Let me see that. I had overlooked that.

(The document was handed to the court.)

The Court: Go ahead.

The Witness: We are the sole pickup and delivery agent for these major airlines in Los Angeles, and we perform regular pickup and delivery service for all of the airlines. Anyone that wishes anything picked up, or anything picked up by the airlines, it is handled through our service. We get our orders from the airlines.

Now, on deliveries, we report—we have offices at the airport, and we report at midnight, and start checking the loads from the various airlines on

(Testimony of Jerome M. Miller.)

the deliveries, and we have responsible men at the airport for checking these deliveries.

They are taken from the airplanes, loaded into the various airlines receiving dock. Then our superintendent, or our foreman out there, will check the merchandise from the airbill to the consist. The consist is what the airlines prepare for us, so that we may in turn rebill them.

Then it is loaded into one of our pieces of equipment. Mainly on the smaller merchandise, it is shuttled down to [102] our downtown terminal. On large loads, why, if it is more economical to handle them direct, we will handle them direct from the airport to the consignee.

But we will have anywhere from, oh, five to six trucks delivering on a morning trip like that from the airport into our terminal, and then it is re-distributed among approximately a hundred trucks for delivery that morning.

Q. (By Mr. Groff): I show you Plaintiff's Exhibit 2, which is an airbill in connection with the Calnevar shipment. How did that get into your hands—into the hands of Twentieth Century?

A. This airbill is given to us, along with all of the airbills which come into TWA, or Trans World Airlines for delivery.

They are given to our foreman at the airport, along with the consist. There may be anywhere from ten to 100 or 200 deliveries every morning, and they will give us that many airbills for their deliveries.

(Testimony of Jerome M. Miller.)

Q. And do you make deliveries for TWA?

A. Yes, sir.

Q. Would you explain to the court your procedure in receiving your orders and making your pickups and your deliveries in connection with TWA?

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They are given to our foreman at the airport, along with the consist. There may be anywhere from ten to 100 or 200 deliveries every morning, and they will give us that many airbills for their deliveries.

Q. In addition to the airbill, are there any other documents that give you directions as to where to deliver the goods?

A. They prepare a consist, which also shows the airbill, and the shipper and the consignee, and the number of pieces, and the weight, which we use for billing, also. But we have that. We have a copy for our own files, and then [103] after we bill it, we send a copy back to them.

Q. And concerning the consist, does the driver take the consist?

A. Our foreman takes the consist, after he checks the freight and makes sure that we have the freight from the airlines.

Q. Is the airbill the only thing that the driver gets?

A. The airbill is the only thing that the driver gets.

Mr. Groff: I have no further questions.

Cross-Examination

By Mr. Wright:

Q. Mr. Miller, is there some system whereby your supervisor or foreman out at the airport makes a notation if he discovers that a particular item of air cargo is damaged at the time it is tendered to him?

A. Yes, sir. Our foreman, and all of our drivers and employees are instructed to be very careful on freight that they receive. If there are any gouges, or if any merchandise is opened, looks like it has been opened and resealed, they are instructed to

(Testimony of Jerome M. Miller.)

make a notation on this consist, and which they have been following fairly religiously.

Q. I see. In other words, the practice is that at the time American Airlines, or TWA, or someone gives them [104] the airbill and the consist, and the supervisor out there at the airport sees the package has been damaged, or re-coopered, he then makes a notation on the consist? A. Yes, sir.

Mr. Wright: Thank you very much. I have no further questions.

Mr. Brill: I have no questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Groff: The defendant Twentieth Century Delivery Service rests.

The Court: All right.

Mr. Brill: The defendant Trans World Airlines, Inc., rests, your Honor.

The Court: All right. Any rebuttal?

Mr. Wright: No, your Honor.

The Court: Then I will hear any argument you want to present. [105]

* * *

Mr. Wright: Your Honor, I don't think we have established a case against Trans World Airlines. My reason for bringing the Trans World Airlines in is simply this, as I have told counsel: Without Trans World Airlines in the picture, there is no connection. We have no way of knowing what this

relation is between the parties until the proofs are in, you see. In other words, we only contract——

The Court: Do you want to dismiss now as to Trans World Airlines?

Mr. Wright: We will dismiss as to Trans World Airlines.

The Court: All right. Voluntary dismissal will be entered under Section 41(a) as to Trans World Airlines. [117]

* * *

The Court: All right. The matter will stand submitted, gentlemen. I want to take a little time to clarify my thoughts on the matter, and you will be notified in due time.

I think the question of liability is comparatively easy. It presents a question of fact. The other one presents a little different question, and I will work it out, and let you know.

[Endorsed]: Filed April 5, 1956. [143]

—

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 42, inclusive, contain the original

First Amended complaint;

Answer of Defendant Trans World Airlines,
Inc.;

Answer of defendant Twentieth Century Delivery Service;

Stipulation re Dismissal;

Findings of Fact & Conclusions of Law & Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court had on: January 10, 1956; January 11, 1956; January 18, 1956; and plaintiff's exhibits 1 through 9, inclusive, and defendant's exhibit A, all in the above-entitled cause; constitute the transcript of record to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing transcript amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 2nd day of April, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15085. United States Court of Appeals for the Ninth Circuit. Twentieth Century Delivery Service, Inc., a Corporation, Appellant, vs. St. Paul Fire and Marine Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: April 3, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 15085

TWENTIETH CENTURY DELIVERY SERVICE, INC.,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes Now the Appellant and submits herewith
its Statement of Points:

I.

That the following Findings of Fact are not supported by the evidence:

Finding No. IX. "On or about July 12, 1954, Trans World Airlines, Inc., did hand said coffee vending machine in good order and condition to defendant Twentieth Century Delivery Service, Inc., for delivery to Calnevar at Los Angeles International Airport."

Finding No. XI. "That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged."

Indicated portion of Finding No. XIII. "That the sum of \$1,931.25 was the reasonable value of the loss of use of said coffee maker."

The indicated portion of Finding No. XVIII. "That defendant Twentieth Century Delivery Service, Inc., * * * and was not covered or encompassed within or by the said air freight tariff of Trans World Airlines, Inc."

Finding No. XIX. "That there is no evidence that the Calnevar Company entered into any agreement with defendant Twentieth Century Delivery Service, Inc., respecting the value of said automatic coffee maker."

II.

The following Conclusions of Law are not supported by the evidence and are contrary to law:

Conclusion No. I. "That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc."

Conclusion No. II. "That defendant Twentieth Century Delivery Service, Inc., cannot limit its liability for said damage by any provision contained in air freight tariff of Trans World Airlines, Inc."

Conclusion No. III. "That the damage reasonably sustained by Calnevar Company was in the sum of \$9,656.25."

Conclusion No. V. “That plaintiff is entitled to judgment against Twentieth Century Delivery Service, Inc., in the sum of \$9,656.25.”

Respectfully submitted,

/s/ GENE E. GROFF,

Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1956.



No. 15085.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

GENE E. GROFF,

210 West Seventh Street,
Los Angeles 14, California,

Attorney for Appellant.

FILED

JUL 14 1956

PAUL P. O'BRIEN, CLERK



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No. 15085.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

The Plaintiff, St. Paul Fire and Marine Insurance Company, Inc. (Appellee here) commenced an action in the United States District Court for the Southern District of California, Central Division, and did file a First Amended Complaint alleging two causes of action against each of the Defendants, Trans-World Airlines, Inc., hereinafter referred to as TWA, Air Cargo, Inc., Twentieth Century Delivery Service, Inc., a corporation (Appellant here), hereinafter sometimes referred to as Twentieth Century, and Doe I, Doe II, Doe III and Doe IV.

Said Amended Complaint alleged diversity of citizenship as respects the Defendant TWA, Air Cargo, Inc. and Twentieth Century, and alleged a controversy involving damage in excess of the requisite jurisdictional amount.

This appeal is brought under Title 28, United States Code, Section 1291, as being within the usual appellate jurisdiction of this Court upon appeal from final judgments in actions at law.

Statement of the Case.

Plaintiff (Appellee) brought two separate causes of action under a First Amended Complaint. One cause was for breach of contract and the other for negligence in the carriage of goods. TWA, Air Cargo, Inc., Twentieth Century and Doe I, Doe II, Doe III and Doe IV were named as Defendants as respects each cause of action [Tr. p. 3]. Before judgment the actions were dismissed as to TWA, Air Cargo, Inc., and Doe I, Doe II, Doe III and Doe IV [Tr. pp. 39, 114].

In EACH of the causes of action the Plaintiff alleged that the Calnevar Company, hereinafter referred to as Calnevar, entered into a written contract with the Defendant TWA for the carriage of a certain prototype automatic coffee vending machine from St. Louis, Mo., to Los Angeles, California, and that TWA did transport said machine to Los Angeles, California [Tr. pp. 5-6]. Plaintiff further alleges that TWA did hand said machine to Twentieth Century at Los Angeles International Airport and direct its delivery to Calnevar Company, 1732-42 West Washington Boulevard, Los Angeles, California [Tr. p. 6].

Each of the causes of action allege that the Plaintiff had issued a property damage policy covering physical

damage to the coffee vending machine and that said policy provided for additional payment in the amount of 25% of the physical damage by and for the loss of use of the article so insured and that the Plaintiff paid \$9,656.25 to Calnevar and became subrogated to this extent to the rights of Calnevar [Tr. p. 7].

The FIRST cause of action alleges that by reason of gross negligence of the Defendants the coffee vending machine was physically damaged to the extent of \$7,725.00 [Tr. pp. 6-7].

The SECOND cause of action alleges that the Defendants delivered to Calnevar at Washington Boulevard, Los Angeles, California, the coffee vending machine in a damaged and broken condition and that the Defendants breached their contract and that the Plaintiff was thereby damaged to the extent of \$9,656.25 [Tr. p. 8].

The Defendant Twentieth Century denied generally that the Plaintiff was damaged by reason of any negligence on the part of Twentieth Century or by a breach of contract [Tr. pp. 19-22].

Twentieth Century further pleaded in defense that the coffee vending machine was shipped pursuant to a uniform Airbill which provided that said machine was accepted for transportation subject to the governing classifications and tariffs in effect as of the date of said Bill and that the declared value of said machine was agreed and understood to be not more than the value stated in the governing tariffs for each pound upon which charges were assessed [Tr. pp. 23-26].

Twentieth Century further pleaded for defense that the governing tariff provided that the involved shipment was deemed to have a declared value of 50¢ per pound

but not less than \$50, unless a higher value was declared on the Airbill at the time of receipt of shipment from the shipper [Tr. p. 27]. Twentieth Century further pleaded that Rule 3.1(c) of the Airfreight Rules Tariff No. 1-A provided that the Airbill and tariffs applicable to the shipment should apply at all times when the shipment was being handled by or for the carrier including air transportation by the carrier and pick-up, delivery and other ground services rendered by the carrier or any other person performing for the carrier such pick-up, delivery or ground services in connection with the shipment [Tr. p. 26]. Twentieth Century further alleged that at the time and place of damage Twentieth Century was handling the coffee vending machine for TWA and was delivering and performing ground services in connection with the shipment of said machine for TWA [Tr. pp. 26-27].

Upon these issues the case came on for trial.

Summary of Facts.

By stipulation the evidence establishes that on July 20, 1954, Calnevar entered into a contract with TWA at St. Louis, Mo., for the transportation from St. Louis, Mo., to 1732-42 West Washington Blvd., Los Angeles, California, of one prototype automatic coffee vending machine and one carton of parts. Said contract was evidenced by Airbill No. 933916 issued by TWA [Ex. 2; Tr. p. 43]. That said Airbill did expressly provide for delivery of said machine to 1732-42 West Washington Blvd., Los Angeles, California and for charges therefor. That said Airbill provided that it was agreed and understood that the declared value was to be not more than the value stated in the governing tariffs for each pound

upon which charge was assessed unless a higher value was declared [Ex. 2].

Airbill No. 933916 did not provide for any higher declared value than that provided by the governing tariffs [Ex. 2, Tr. p. 43].

By stipulation the evidence establishes that at the time of this shipment there was in existence a contract in writing by and between TWA and the Defendant Twentieth Century wherein and whereby Twentieth Century agreed to perform services of pick-up, delivery and other ground services incidental to the transportation of air freight by TWA [Ex. 4; Tr. p. 42, para. 6, p. 44]. That Twentieth Century did transport by motor truck said automatic coffee vending machine to 1732-42 West Washington Boulevard, Los Angeles, California, and did deliver the same to Calnevar [Tr. p. 105]. That on July 12, 1954, TWA delivered said machine to Calnevar on Washington Boulevard, Los Angeles, California, and Calnevar did receipt for delivery of said machine on a copy of TWA Airbill No. 933916 [Ex. 2; Tr. p. 108]. That Calnevar, upon delivery of the machine, contracted and made claim against TWA in connection with alleged damage and did call a TWA inspector to inspect said damage [Tr. p. 57]. That the Plaintiff introduced evidence to the effect that the cost of repairing the physical damage to said machine would involve 700 work hours at a maximum cost of \$8.00 per hour, or \$5600.00 plus a maximum cost of supervision and expediting of \$865.00, for a total of \$6,468.00. Plaintiff also introduced evidence that if overtime were used in various ways that the cost of repair of the physical damage would be either \$6,865.00, \$7,345.00, \$7,400.00, \$7,725.00, or \$7,920.00 [Ex. A, Tr. p. 92].

That the Plaintiff St. Paul Fire and Marine Insurance Company was subrogated to whatever rights in the premises belonged to Calnevar Company [Tr. p. 44]. That the Plaintiff St. Paul Fire and Marine Insurance Company paid to Calnevar the sum of \$9,625.25 [Tr. p. 91].

That by stipulation the evidence establishes that the Airfreight Rules Tariff No. 1-A in effect at the time of this shipment provided as follows:

Rule No. 3.1

“(a) The shipper shall have the duty to prepare and present a non-negotiable Airbill with each shipment tendered for transportation subject to this Tariff and tariffs governed hereby. If the shipper shall fail to present such Airbill to the carrier at the time of tendering the shipment, the carrier may accept such shipment if accompanied by a non-negotiable shipping document, or memorandum. No Airbill or other shipping document or memorandum issued or accepted by a carrier shall be negotiable, irrespective of the wording of such document or memorandum. Each such shipment, irrespective of the form of shipping document or memorandum accepted by the carrier in connection therewith, shall be subject to the carrier’s tariffs in effect on the date of acceptance of such shipment by the carrier. * * *”

Rule No. 3.1

“(b) The Airbill, and the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carriers by whom transportation is undertaken between the origin and destination, including destination on reconsignment or return of the shipment; and shall inure also to the benefit of any other person, firm or corporation performing for the carrier pick-up,

delivery, or other ground service in connection with the shipment.”

Rule No. 3.1

“(c) The Airbill, and the tariffs applicable to the shipment shall apply at all times when the shipment is being handled by or for the carrier, including air transportation by the carrier and pick-up, delivery and other ground services rendered by the carrier or any other person performing for the carrier, such pick-up, delivery or ground services in connection with the shipment.”

Rule No. 4.3

“(a) 1. A shipment shall be deemed to have a declared value of \$0.50 per pound (but not less than \$50.00) unless a higher value is declared on the Airbill at the time of receipt of the shipment from the shipper. * * *”

Rule No. 4.3

“3. An additional transportation charge of \$0.10 shall be required for each \$100.00 (or fraction thereof) by which the value declared on the Airbill at the time of receipt of the shipment from the shipper, exceeds \$0.50 per pound or \$50.00 (whichever is higher).”

Rule No. 4.3

“4. The weight used to determine the declared value of a shipment shall be the same as that which is used to determine the transportation charge for such shipment” [Ex. 3, Tr. p. 43].

That by stipulation the evidence establishes that on January 7, 1955, TWA tendered to the Plaintiff the sum of \$122.50 in full settlement of the Plaintiff's subrogation and that said check was refused and returned to TWA on January 20, 1955 [Ex. 1, Tr. pp. 42-43].

Assignments of Error.

The Appellant has heretofore filed with this Court the following Statements of Points:

I.

“The following Findings of Fact are not supported by the evidence.

“Finding No. IX. On or about July 12, 1954, Trans World Airlines, Inc., did hand said coffee vending machine in good order and condition to defendant Twentieth Century Delivery Service, Inc., for delivery to Calnevar at Los Angeles International Airport [Tr. p. 117].

“Finding No. XI. That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged [Tr. p. 117].

“Indicated portion of Finding No. XIII. That the sum of \$1,931.25 was the reasonable value of the loss of use of said coffee maker [Tr. p. 118].

“The indicated portion of Finding No. XVIII. That defendant Twentieth Century Delivery Service, Inc., * * * and was not covered or encompassed within or by the said air freight tariff of Trans World Airlines, Inc. [Tr. p. 118].

“Finding No. XIX. That there is no evidence that the Calnevar Company entered into any agreement with defendant Twentieth Century Delivery Service, Inc., respecting the value of said automatic coffee maker [Tr. p. 118].

II.

“The following Conclusions of Law are not supported by the evidence and are contrary to law:

“Conclusion No. I. That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc. [Tr. p. 118].

“Conclusion No. II. That defendant Twentieth Century Delivery Service, Inc., cannot limit its liability for said damage by any provision contained in air freight tariff of Trans World Airlines, Inc. [Tr. p. 118].

“Conclusion No. III. That the damage reasonably sustained by Calnevar Company was in the sum of \$9,656.25 [Tr. p. 118].

“Conclusion No. V. That plaintiff is entitled to judgment against Twentieth Century Delivery Service, Inc., in the sum of \$9,656.25” [Tr. p. 119].

The Appellant does hereby withdraw the following Statements of Points and Assignments of Error:

“Finding No. XI. That by reason of the negligence of Twentieth Century Delivery Service, Inc., acting through its servant, said coffee maker and the wooden package in which it was housed were damaged.

“Conclusion No. I. That the automatic coffee vending machine owned by Calnevar Company and insured by plaintiff St. Paul Fire and Marine Insurance Company was damaged through the negligence of defendant Twentieth Century Delivery Service, Inc.”

ARGUMENT.

The Appellant submits that the Trial Court erred in holding:

(1) That the Defendant Twentieth Century was not entitled to the benefit of the declared valuation pursuant to the Airbill and Airfreight Rules Tariff.

(2) That Calnevar, and thereby the Plaintiff, suffered loss in the amount of \$9,625.25 by reason of damage to the coffee vending machine.

I.

That the Defendant Twentieth Century Was Entitled to the Benefit of a Declared Value Pursuant to the Airbill and Airfreight Rules Tariff.

(a) The Provisions of the Airfreight Rules Tariff and the Airbill Clearly Direct That Twentieth Century Was and Is Entitled to the Benefit of the Declared Valuation Provisions of the Airfreight Rules Tariff and Airbill.

The machine was shipped pursuant to Airbill No. 933961, which Airbill provided for delivery to 1732-42 West Washington Blvd., Los Angeles, California [Ex. 2]. By the terms of said Airbill the declared value was agreed and understood to be not more than the value stated in the governing tariffs unless a higher value was declared [Ex. 2].

No higher value was declared [Tr. p. 43].

The governing tariff of TWA provided as follows:

“Each *shipment*, irrespective of the form of shipping document or memorandum accepted by the carrier in connection therewith, shall be subject to the carrier’s tariffs in effect on the date of acceptance of such *shipment* by the carrier.”

Rule No. 3.1(a) [Ex. 2].

“The Airbill, and the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carriers by whom transportation is undertaken between the origin and destination, including destination on reconsignment or return of the shipment; and shall inure also to the benefit of *any other person, firm or corporation* performing for the carrier pick-up, *delivery, or other ground service* in connection with the *shipment*.”

Rule No. 3.1(b) [Ex. 2].

“The Airbill, and the tariffs applicable to the *shipment* shall apply at all times when the shipment is being *handled* by or for the carrier, including air transportation by the carrier and pick-up, *delivery and other ground services* rendered by the carrier or *any other person* performing for the carrier, such pickup, *delivery or ground services* in connection with the shipment.”

Rule No. 3.1(c) [Ex. 2].

It is to be noted that the general Section 3.1(a) refers to *shipment* and not to the character of the parties involved in the shipment transaction [Ex. 2].

The punctuation of Section 3.1(b) is compelling in its construction. The Section is divided by a semi-colon. The first portion specifically refers to shipper, consignee and carriers. The portion following the semi-colon provides that the Airbill and tariffs applicable to the *shipment* shall inure *also* to the benefit of *any other person, firm or corporation* performing for the carrier pick-up, *delivery or other ground services* in connection with the shipment. The necessary deduction is that the provisions of the Airbill and tariffs inure to the benefit of others than shippers, consignees or carriers [Ex. 2].

Rule 3.1(c) provides that the Airbill and tariffs applicable to the *shipment* shall apply at all times while the shipment is being *handled* by or *for* the carrier including * * * *delivery and other ground services* rendered by * * * *any other person* performing such * * * delivery or ground services in connection with the shipment. By this section the only qualification set forth for the application of the benefit of the Airbill and tariffs to the shipment is that at the particular point and time in shipment that the shipment was being handled by “any other person.”

The clear and unambiguous intent from the above quoted rules would seem to lead to only one conclusion and that is that the provisions of the Airbill and tariff apply to the shipment and that the benefit of such tariffs are specifically intended to apply to other than the shipper, consignee or carrier and more specifically to “any other person” performing delivery or other ground services.

The undisputed evidence establishes that Twentieth Century was in the process of making a delivery at the direction of TWA to the point of destination set forth in the Airbill at the time the alleged damage occurred [Tr. pp. 106-107].

The shipping weight of the involved articles was 245 pounds. Charges were assessed upon this weight. The governing tariff established the declared value at \$0.50 per pound [Rule No. 4.3; Ex. 3], or the sum of \$122.50.

The declared value pursuant to the tariff was tendered to the Plaintiff and refused [Para. 5 of Stip., Ex. 1, Tr. p. 42].

(b) Does the Law Prevent the Application of the Clear Provisions of the Airfreight Tariff Rules and Airbill to This Shipment?

(1) THE FOLLOWING ANALOGOUS CASES ESTABLISH AND SUPPORT THE LEGAL NECESSITY OF THE APPLICATION OF THE VALUATION PROVISIONS OF THE TARIFF AND AIRBILL TO THE INVOLVED SHIPMENT.

The Courts have consistently held that the benefit of the bills of lading involving interstate commerce and subject to inter-state commerce regulations apply to the transportation of the article from inception to destination, and not to the initial carrier only.

In the case of *Texas & Pacific Railway Co., et al. v. Leatherwood* (1919), 250 U. S. 478, 63 L. Ed. 1096, 39 S. Ct. 517, the Court had for its consideration the question of whether the provisions requiring suit to be brought within six months contained in the initial carrier's bill of lading inured to the benefit of other carriers. The case was transferred from the Texas Court to the Supreme Court of the United States and the Court reversed the Texas judgment and stated as follows:

"The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination and its terms with respect to conditions of liability are binding upon the shipper and upon all connecting carriers just as a rate property filed by the initial carrier is binding upon them."

To the same effect see:

Lyon v. Canadian Pacific Railway Co., 163 N. E. 180, 60 A. L. R. 1247.

In the case of *Western Transit Co. v. A. C. Leslie & Co.*, 242 U. S. 448, 61 L. Ed. 423, damage occurred to

certain copper ingots while stored in a warehouse awaiting further shipping directions. The carrier asserted a declared value based upon the bill of lading and the tariffs filed with the I. C. C. The Supreme Court reversed the Court of the State of New York, which had held the carrier responsible on the basis that warehousing did not carry with it the benefit of the declared valuation. The Supreme Court of the United States stated the rule as follows:

“The release valuation clause in an inter-state bill of lading when based upon a difference in freight rates is valid. (Citing cases.) The limitation of such liability by means of such valuation contained in the bill of lading continues, although the service of carrying has been completed and the goods are being held by the carriers strictly as a warehouseman. (Citing cases.) The provisions of the bill of lading govern even where the goods are allowed to remain in the carrier’s warehouse after giving receipt therefor and payment of freight. The carrier and the shipper can make no alteration of the terms upon which goods are held under a tariff, until there has been an actual delivery of the goods to the consignee.”

In the case of *Georgia, Florida & Alabama Railroad Co. v. Blish Milling Co.*, 231 U. S. 190, 60 L. Ed. 948, the issue involved was whether the delivering carrier was entitled to the benefit of the provisions of the bill of lading of the original carrier in connection with a notice of claim. The Court stated the rule as follows:

“The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an inter-state shipment governs the entire transportation and thus fixes the obligation of all partici-

pating carriers to the extent that the terms of the bill of lading are equitable and valid. The liability of any carrier over the route in which the articles were routed for loss or damage is that imposed by the Act as measured by the original contract of shipment, so far as it is valid under the Act. (Citing cases) * * *

“There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The Statute casts upon the initial carrier the responsibility with respect to the entire transportation. The aim was to establish unity of the responsibility (Citing cases) and the words of the Statute are comprehensive enough to embrace responsibility for all losses resulting from a failure to discharge a carrier’s duty as to any part of the agreed transportation, which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice and claim in case of failure to make delivery, the fair meaning of the stipulation is that it includes all cases of such failure, as well as those due to misdelivery as those due to the loss of goods. That the provision in question is not to be construed in one way with respect to the initial carrier and in one way with respect to the terminal carrier. As we have said the latter takes the goods under the bill of lading issued by the initial carrier and its obligations are measured by the terms. (Citing cases.)”

In the case of *Cleveland, Cincinnati, Chicago & St. Louis Railroad Co. v. Dettlebach*, 239 U. S. 588, 60 L. Ed. 453, the action was by Dettlebach against the railway

company for market value of certain goods shipped in interstate commerce, lost through the negligence of the railway company while in its possession as warehouseman at the place of destination. The goods were being shipped under description of household goods over the Chicago, Burlington & Quincy Railway and connecting lines consigned to his wife in Cleveland. Transportation was arranged under terms of bill of lading prepared in form approved by the ICC which contained a provision, "That every service hereunder shall be subject to all of the conditions whether printed or written herein contained, including conditions on the back hereof in which are agreed to by the shipper and accepted for himself and his assigns." Among the printed conditions on the back of the form were clauses providing for value to be determined at the place and time of shipment and then on the face of the bill was declaration consigned by the plaintiffs' agent, "I hereby declare that the valuation of the property shipped under this bill of lading does not exceed \$10.00 per hundred weight." Judgment in the lower courts for the plaintiff brought on an appeal to this Court and judgment reversed, cause remanded for further proceedings in accordance with the opinion.

"It is no longer open to question that if the loss had occurred in the course of transportation upon the defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing a lower of two rates of freight, would have been binding on plaintiff in view of this Carmack Amendment. (Citing cases.) The question is, whether the limitation of liability may have been deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman."

The provision that we have quoted from the contract is to the effect that "every service to be performed hereunder" is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shippers and the carriers such value shall be the maximum amount for which any carrier may be held liable whether or not the loss occurs from negligence, and that this, as a mere matter of construction, applies to the relation of warehouseman as well as the strict relation of carrier, is manifest from the further provision that the property not removed within 48 hours after notice of arrival may be kept "subject to a reasonable charge for storage and to carriers responsibility as warehousemen only." Thus "any language for loss or damage for which any carrier is liable" includes not merely the responsibility of the carrier, strictly so-called, but carriers responsibility as warehouseman also.

And this is quite in line with the letter and policy of the Commerce Act and especially with the amendment * * * known as the Hepburn Act * * * which enlarged the definition of the term "transportation" (this under the original Act included merely "all instruments of shipments are carriage"). So as to include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract express or implied for the use thereof *and all services in connection with* the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and hauling of property transported and it shall be the duty of every carrier, subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor and establish through routes and just and reasonable rates applicable thereto. * * *

From this and other provisions of the Hepburn Act, it is evident that Congress recognized that the duty of the carriers to the public included a performance of a variety of services, that, according to the theory of the common law, were separable from the carrier's service as carrier and, in order to prevent overcharges and discriminations from being made into the pretext of performing such additional services, it enacted that insofar as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was, of course, made in view of this legislation and while not intended to be and not in law binding upon carriers, it is entitled to some weight. * * * We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the evaluation placed on the property here in question, must be held to apply to the defendant's responsibility as warehouseman.

The same rule as enunciated in the bill of lading cases as applied to railroads was also applied in the case of *A. M. Collins & Co. v. Panama Railway Company*, 197 F. 2d 893, 97 L. Ed. 677, 344 U. S. 875, 73 S. Ct. 168. An electrical freezing unit was shipped from New Jersey to the Canal Zone pursuant to bill of lading. The unit went by steamship to the port of Christobal, Panama Republic. The services of the Panama Railway Company were engaged to unload the freezing unit. The freezing unit, while being removed from the ship to the dock, was dropped resulting in damage. The owner of the unit sued the Panama Railway Company, who by its answer

pleaded the provisions of the ocean bill of lading limiting recovery under a declared value to \$500.00. The Court held that the limitation was binding under the negotiable bill of lading and stated as follows:

“It is conceded as it must be that the contract of carriage under the bill of lading was not fulfilled until the cargo described was delivered on dock at Christobal. The controlling feature of the case is not as Appellants contend who are the formal parties to the bill of lading. What is controlling are the terms, purpose and effect of the Bill of Lading as applied to the facts. The unloading of the shipment was the obligation of the carrier. In the absence of the different agreement with persons not parties thereto, the terms of the bill of lading controlled all steps of the transportation, including, of course, the discharge of the shipment. Stevedore was not a meddler, nor did it inflict intentional harm. It was an Agent selected by the carrier to carry out the carrier’s obligation to safely deliver and discharge the cargo as required by its contract with the shipper. The negligent injury and damage arose in the course of this very performance of the carrier’s obligation. It is well stated by the trial court that the carrier would engage such services must have been contemplated by the parties. The situation is substantially the same as if carrier had shipped by another vessel as authorized by the bill of lading. A stevedore in so unloading, in every practical sense, does so by virtue of the bill of lading, and though not strictly speaking a party thereto, is, while liable as an agent for his own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed. * * *

“All parties concerned with the negotiable ocean bill of lading, the carrier, the shipper, the consignee, the discounting bank and the insurance underwriter, are alike interested not so much in the method as in the *result* to be achieved, the delivery of the cargo at the port of destination in good condition. The bill of lading contract with the carrier covers that completed service from the time of loading of the goods to their discharge from the ship. The extent of liability of the carrier and of other persons performing that service under the carrier does not depend upon the means adopted but is governed by the contract covering the entire service.

“The limitation of liability of the carrier under the Carriage of Goods by Sea Act is not intended to be personal, but unless otherwise agreed, extends to any other agency by means of which the carrier performs its contract and transportation and delivery. As well stated in 2 RESTATEMENT OF AGENCY, Section 347: ‘An Agent who is acting in pursuance of his authority has such immunities of the principle as are not personal to the principle.’ (Citing cases.)”

In the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.*, 224 F. 2d 181, the issue involved was whether the provisions of a railway express agency receipt for rail transportation and air express in connection with a release valuation was valid. The shipment was lost while in the hands of one of the connecting railway carriers referred to as Soo. The express receipt provided as follows: “The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee and all carriers handling this shipment and shall apply to any reassignment or return thereof.” The Court held the release valuation binding and stated:

“A railroad which under the circumstances in this case is transporting a car in which an express shipment is in the physical custody of employees of the express company, is not only a carrier, but is a ‘Carrier Handling’ said shipment as defined in clause 1 of the receipt * * *. We find it unnecessary to decide whether the plaintiffs are correct in that contention that the railroad express is an independent contractor and not agent for Soo, even if the plaintiffs are right in so urging, the facts would not conflict with our reasoning and the result which we reach.”

(2) THE DECLARED VALUATION PROVISIONS OF AN AIR
TARIFF ARE VALID AND ENFORCIBLE.

Lichten v. Eastern Airlines, 189 F. 2d 939, 25
A. L. R. 2d 1337, 1951 U. S. Av. 310.

S. Toepfer v. Braniff Airways, Inc., 135 Fed. Supp. 671, 691. In this case the court upheld the declared value of \$100 against the plaintiff’s claim of approximately \$90,-000.00 for lost jewelry and stated as follows, on page 672:

“There is no genuine issue as to any material fact. The tariff filed by the defendant in the office of the Civil Aeronautics Board pursuant to the provisions of the Civil Aeronautics Act * * * became a part of the contract of transportation. (Citing cases.) Since no higher value was declared and since no fee for additional coverage was paid, the plaintiff can recover no more than the \$100.00 provided in the tariff and tendered by the defendant which would be true even if the loss of the baggage was occasioned by the negligence of the carrier. (Citing cases.)”

See also:

Wilkes v. Braniff Airways, Inc., 288 P. 2d 377.

- (3) THE LAW RECOGNIZES THAT THE RULES APPLICABLE TO RAIL AND EXPRESS COMPANIES AS PROVIDED FOR BY TARIFFS FILED WITH THE INTERSTATE COMMERCE COMMISSION ARE ANALOGOUS TO AIR TARIFF RULES AND THAT THE AIR TARIFF RULES SHOULD BE APPLIED, OTHER THINGS BEING EQUAL, IN THE SAME MANNER.

In the case of *Wilkes v. Braniff Airways, Inc., supra*, the court sustained the air carrier's contention of the validity of the declared valuation and stated as follows:

"Carriers by rail and express companies are required to file their rate schedules at the Interstate Commerce Commission while air carriers file their rules and schedules with the Civil Aeronautics Board. No reason has been suggested why the same rules as to limited liability should not apply equally to each class of interstate carrier."

- (c) By the Use of the Term "Any Other Person" in the Tariff Rules It Was Intended to Designate a Broad and Unrestricted Classification of Parties Qualified Only by the Condition That Said Parties Be Performing the Specified Services Which Include Delivery and Ground Services.

In the case of *City of Buffalo v. Hannah Furnace Corp.*, 305 N. Y. 369, 113 N. E. 2d 520, the Court had for consideration the interpretation of the meaning of the words "any other person." The lower Court held that such a wording did not include the employee of the state or government. The Appellate Court reversed the lower Court and stated:

"The Courts should not strain to limit the availability of such an important remedy by narrowly circumscribing the reach of words so inclusive as

‘any other person’ and its very generality bespeaks a legislative design that the provision be accorded a very broad content.” (Emphasis added.)

In the case of *Escrow Inc. v. Berle of Haworth*, 36 N. J. Supp. 469, 116 A. 2d 526, the Court had for its consideration the interpretation of the words “any other persons” and stated:

“It should be noted that the said statute states ‘* * * Provided that no higher price nor better terms shall then be bid for said property by any other person in which case the sale is to be made to the highest bidder. * * *’ Obviously the sale under the statute was apparently conducted on the basis of competitive bidding. No person offering a higher price or better terms can be deprived of the right to bid. ‘Any other person’ cannot mean any other established churches as contended by the municipality.”

In the case of *State v. Small*, 111 A. 2d 201, the Court had for consideration a statute that provided “no licensee, sales agent or any other person shall sell or give away, etc.” It was contended that the general phrase “nor any other person” should be restricted to the specific words that preceded it such as licensees and sales agents. The Court refused to apply the limited interpretation sought.

See also to the same effect:

State v. Campbell, 76 Iowa 122, 40 N. W. 100;

Commonwealth Title Ins. & Trust v. Ellis, 192 Penn. St. 321, 43 Atl. 1034.

The appellant herein asserts that, by the clear terms of Rule No. 3.1 (a), (b) and (c) of the Airfreight Rules Tariff, Twentieth Century clearly was within the classi-

fication of "any other person." By the authority above quoted, if there can be any question as to Twentieth Century being within such a classification, the above authorities clearly indicate that the words themselves are broad in character and that their use is indicative that they are not intended to be qualified by other classifications used with them.

(d) Twentieth Century Was "Handling" the Shipment and Performing Delivery at the Time of the Alleged Damage for TWA.

Without belaboring either the evidence in the record or the law, the appellant asserts that the evidence amply establishes that at the time of the alleged injury Twentieth Century was *handling the shipment* and cites the following cases:

International Harvester Co. v. National Surety Co., 44 F. 2d 746, 75 L. Ed. 788, 51 S. Ct. 179, 282 U. S. 895;

Employers Mutual Liability Ins. Co. of Wis. v. Lloyds, 80 Fed. Supp. 343 (Affirmed at 177 F. 2d 249).

In the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.* (*supra*), the case involved a shipment in the hands of a connecting carrier and the Court stated as follows:

"A railroad which, under the circumstances in this case, in transporting a car in which an express shipment is in the physical custody of the employees of the express company, is not only a carrier, but is a 'Carrier Handling' said shipment as defined in Clause 1 of the receipt * * *."

- (e) Where a Party Contracts to Perform, as to the Contractee the Duty of Performance Remains That of the Contractor and the One Performing for the Contractor as Respects the Contractee Is Acting for the Contractor Even in the Extreme Instances Where the Performing Party Is an Independent Contractor as Respects the Agreement Between the Contractor and the Performing Party.

Pacific Fire Ins. Co. v. Keany Boiler & Mfg. Co.,
277 N. W. 226 (Minn.);

H. W. Van Slyke Warehouse Co. v. Vilter Mfg. Co., 291 Pac. 1103 (Wash.);

Schulte v. United Electric Co., 66 N. J. Law 435,
53 Atl. 204;

Marion A. Davidson v. Madson Corp., 257 N. Y.
120, 177 N. E. 393, 76 A. L. R. 1103;

Huckins Hotel Co. v. Clampett, 224 Pac. 945
(Okl.).

In the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.* (*supra*), the Court stated as follows:

“We find it unnecessary to decide whether the Plaintiffs are correct in that contention that the railroad express is an independent contractor and not agent for Soo, even if the Plaintiffs are right in so urging, the facts would not conflict with our reasoning and the result which we reached.”

The result reached in the above case was that the release valuation inured to the benefit of the connecting carrier, Soo.

II.

Does the Evidence Support the Finding That Calnevar, and Thereby the Plaintiff, Suffered Loss in the Amount of \$9,625.25 by Reason of Damage to the Coffee Vending Machine?

- (a) "Where the Property Has Not Been Wholly Destroyed the Proper Measure of Damages for Its Partial Destruction Is the Difference Between Its Value Immediately Before and Immediately After the Injury But if It Can Be Repaired for a Lesser Sum the Cost of Repairing Thereupon Becomes a Measure of Damage."

14 Cal. Jur. 2d 788, Sec. 156.

The rule of damages permits the use of the cost of repair as a measure of damage provided such repair cost does not exceed the value difference before and after, or in any event the total value of the property.

Lane v. Spurgeon, 100 Cal. App. 2d 460, 223 P. 2d 889.

The evidence establishes that the prototype which was damaged was hand made [Tr. p. 51]. That the original cost thereof was \$75,000.00 to \$100,000.00 [Tr. p. 51], and that the machine was a prototype [Tr. p. 47], and that prior to the date of damage tests were completed and finalized [Tr. pp. 49-50]. The machine had been shown in St. Louis, Mo. [Tr. p. 51]. There were tentative arrangements for the sale of the machine and the patent rights [Tr. p. 63]. Bids from subcontractors for the manufacture of the parts had been obtained in bushel baskets [Tr. pp. 69, 70, 71]. That a machine made from the drawings and under production of one hundred units would cost, by Mr. Sloier's testimony, \$500.00 [Tr. p. 67]. Based upon Mr. Graham's report,

in volume production the machine could be made for \$600.00 to \$700.00 [Ex. A]. Mr. Sloier equivocally testified as to certain asserted uses which were required of the prototype machine, which the appellant asserts, by the nature of the testimony and the evidence adduced, amounts to only speculation.

“Damages which are purely speculative, fanciful or imaginative cannot be recovered.”

Myers v. Nolan, 18 Cal. App. 2d 319, 63 P. 2d 1206.

An analysis of all the evidence pertaining to the nature of the hand made prototype which was alleged to be damaged, the appellant submits, forces a conclusion that this particular coffee vending machine had expended its usefulness as a prototype and that the value of such machine could not exceed its value as a piece of merchandise consisting of a coffee dispensing machine.

The Appellant submits that the evidence in the record establishes that the maximum value of such damaged machine, in any event, was \$700.00.

(b) The Evidence Establishes That the Amount Paid by the St. Paul Fire and Marine Insurance Co. for the Physical Damage Was Arbitrary and Speculative.

The St. Paul Fire and Marine Insurance Co. made payment for physical damage in the amount of \$7,725.00 on the basis of Mr. Graham's report [Tr. pp. 94, 99]. The report of Mr. Graham predicates the figure of \$7,725.00 upon a formula of work hours which involves the use of overtime and double overtime [Ex. A]. Mr. Graham's report further sets forth that even with the use of some overtime that the estimate of the cost of repair could be as low as \$6,865.00 [Ex. A]. The record

fails to disclose at any point the justification for overtime or that overtime was actually used in the repair of the machine. Mr. Graham's report further sets forth an estimate of 700 man hours for repairs of the machine at a maximum straight rate of \$8.00 per hour, which amounts to \$5,600.00, plus a maximum estimate of \$865.00 for supervision and expediting, making a total of \$6,465.00 as the cost of repairs if no overtime or double overtime were involved [Ex. A].

The method used by the St. Paul Fire and Marine Insurance Co. for the purpose of arriving at the amount they paid Calnevar for the physical damage is such that the appellant asserts that the inference is justified that the amount of damage so arrived at as to the cost of repairs is speculative and does not support the finding of fact as to the amount of physical loss or as to a loss in any other amount.

(c) The Record Fails to Establish That Calnevar Suffered Any Damage by Loss of Use, or Any Measure of Any Such Damage.

The witness Donald Clark, adjuster for the St. Paul Fire and Marine Insurance Co., testified as follows with respect to the payment in the sum of \$1931.25 by the St. Paul Fire and Marine Insurance Co. for loss of use of the coffee vending machine:

“Q. You elected to pay the \$7,725, as set forth in Graham's report; that is correct? A. That is correct.

Q. And the expediting you speak of, that is in addition to the amount that was ascertained by Graham's report for repairs, isn't it? A. That is correct, and I—

Q. And that is an arbitrary figure that is based on an equation set up in your insurance contract, isn't it? A. That is correct.

Q. And there was no investigation made by you whatsoever as to what the value of the loss of use of the machine was, was there? A. It was predetermined by the policy contract." [Tr. p. 99.]

"Q. Referring to the \$1931.25 item, Mr. Clark, is it true that that item was paid purely on the basis of a formula set up in the policy? A. It was paid in accordance with the agreed conditions of that policy, that the company would do that; that in the event that the loss was X-dollars, it would pay 25 per cent above that X-dollars.

Q. And concerning the \$1931.25 item, so far as you know, no further investigation was made as to the factual basis for the loss of use applying to that item? A. It was contractual in the policy.

Q. Contractual only? A. Correct." [Tr. pp. 100-101.]

The record fails to establish any other formula for the ascertainment of the damages by loss of use or that any loss of use actually occurred. The arbitrary use of a percentage of the insurance payment for physical loss as a measure of damages for loss of use is not supported in the record or in business experience as a factual formula for such measure and that is especially true in this instance where the insurance payment for the physical loss arbitrarily, without apparent justification, included payment of overtime and double overtime so that the measure of loss of use became a pawn subject to the whim or fancy of the generosity of the insurance company.

“Profits are not considered as an element of damage if purely speculative or conjectural, or if measured by an indefinite or fanciful conception as to what they would have been had there been no breach of contract.”

32 A. L. R. 121;

Calif. Civ. Code, Secs. 3301, 3333.

“Generally, no recovery can be had for loss of the profits that might have resulted from the manufacture of raw material into other articles, either in an action for breach of a contract to furnish such material or in an action for its negligent destruction, since such profits are too remote and speculative to serve as the basis for an award of damages.”

15 Am. Jur., p. 573, Sec. 156.

“As a general rule, the expected profits of a mercantile business are too remote, speculative, and uncertain to sustain a judgment for their loss. * * * According to the weight of authority, however, a recovery may be had for such losses where they are reasonably certain in character and are the proximate result of either tort or a breach of contract. * * * The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.

“To come within the rule, it must be made to appear that the business which is claimed to have been interrupted was an established one which had been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable. The prospective profits of a new business or enterprise are generally

regarded as being too remote, contingent, and speculative to meet the legal standard of reasonable certainty applicable in determining the elements of recoverable damages in an action for breach of a contract or for a tort. No recovery can be had for damages to the good will or loss of trade of a new and unestablished business, since it can have no good will or trade to lose. * * *

15 Am. Jur., Sec. 157, pp. 573, 574, 575.

Conclusion.

The evidence and the applicable law cited establishes that the declared valuation benefit of the Airfreight Rules Tariff and the Airbill inured to the benefit of the appellant, and that in any event the record fails to establish evidence that supports the Court's findings of damages.

Respectfully submitted,

GENE E. GROFF,

Attorney for Appellant.



No. 15085

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

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vs.

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Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

Supplementary Summary of Facts.

By stipulation, the evidence establishes that Calnevar Company entered into a contract with Trans World Airlines, Inc., at St. Louis, Missouri, on July 10, 1954, for the air transportation of one crated vending machine and one carton of parts from St. Louis to Los Angeles. This contract was evidenced by Trans World Airlines' uniform airbill No. 15-STL-933916 [Tr. p. 41].

Said TWA airbill provided, "DECLARED VALUE—Agreed and understood to be not more than the value stated in the governing tariffs for each pound on which charges are assessed, unless a higher value is declared and applicable charges paid thereon." The airbill indicates that no higher value was declared.

The airbill further provided on its face for a rate of \$16.55 per cwt., making a total weight-rate charge of \$40.55. In addition, the airbill shows pick-up charges of \$1.20; delivery charges of \$1.47; subtotal, \$43.22; transportation tax, \$1.30; and a grand total of \$44.52.

The parties to this action stipulated that there might be admitted into evidence (1) Trans World Airlines, Inc., airbill No. 933916, (2) Trans World Airlines, Inc., tariff filed with the Civil Aeronautics Board (or portion thereof), as set forth in certified true copy dated April 28, 1955, (3) Contract dated April 1, 1952, between Air Cargo, Inc., and Twentieth Century Delivery Service, Inc. [Pltf. Exs. 1, 2, 3 and 4, Tr. p. 41].

In addition to the provisions of Airfreight Rules Tariff No. 1-A, which are set forth in appellant's brief, pages 6 and 7, first revised page 16 of said Airfreight Rules Tariff No. 1-A [Pltf. Ex. 3, Tr. p. 43] provided in part:

"LIMIT OF LIABILITY.

"(a) In consideration of *carrier's rate* for the transportation of any shipment, which rate, in part, is dependent upon the value of the shipment as determined pursuant to Rule 4.3, the shipper and all other parties having an interest in the shipment agree that the value of the shipment shall be determined in accordance with the provisions of Rule 4.3 and that the total liability of the *carrier* shall in no event exceed the value of the shipment as so determined.

"(b) By tendering the shipment to *carrier* for transportation, the shipper, for himself and all other parties having an interest in the shipment, waives all claims for damages beyond the limitations set forth in these rules and regulations and affirms the description of the shipment as recited on the airbill, and the fact that the shipment is not of a nature unsuitable for carriage by air or hazardous thereto.

“(c) Except as provided in paragraph (e) of this rule, the total liability of the *carrier* shall in no event exceed—

“1. The value of the shipment as determined pursuant to Rule 4.3; or

“2. (No application to DAL or UAL) The actual value of the shipment and the time and place of shipment, or

“3. (No application to EAL) The amount of any damages actually sustained, whichever is the least.” (Emphasis added.)

By stipulation, the evidence establishes that a contract was entered into between Air Cargo, Inc., on behalf of Trans World Airlines, Inc., with Twentieth Century Delivery Service, Inc., dated April 1, 1952 [Tr. p. 42]. This contract [Pltf. Ex. 4] provided in part as follows:

“* * * 3. SUPERVISION OF CONTRACTOR’S PERSONNEL—Contractor (Twentieth Century) shall employ and direct all persons performing any of the services to be performed by Contractor hereunder, and such persons shall be and remain the sole employees of and subject to the exclusive control and direction of Contractor in the performance of such services. Neither the Company (Air Cargo, Inc.) nor any Air Carrier (Trans World Airlines, Inc.) shall have the right to control or direct any of the agents, servants, or employees of the Contractor, *it being the intention of the parties hereto that Contractor shall be and remain an independent contractor.* (Emphasis added.)

“* * * 8. LIABILITY, INDEMNITY AND NOTICE OF CLAIM.

“(a) Acts or Omissions of Contractor: The Contractor will protect, indemnify, and hold harmless the Air Carriers, the Company, and their officers, agents, servants, or employees, from and against all

loss, liability, damages, claims, demands, costs, and expenses that any one or more of them may suffer or incur on account of (1) injury to or death of persons and loss or destruction of or damage or delay to air freight or other property, including the conversion thereof, caused by or resulting in any manner from any acts or omissions, negligent or otherwise, of Contractor in performing or failing to perform any of the services or duties to be performed by the Contractor as herein provided * * *.

“(c) *Conclusiveness of Receipt*: Except for concealed loss or damage, in determining liability hereunder the statement of the condition of air freight appearing on any receipt issued by the Contractor or the Air Carrier at the time such air freight is received from the other party shall be conclusive. Such air freight shall be deemed to be in the custody or control of the Contractor from the time such air freight is delivered to Contractor by an Air Carrier or a shipper, as evidenced by the issuing of a receipt therefor by the Contractor to the Air Carrier or shipper as the case may be, until the time such air freight has been delivered to an Air Carrier or consignee, as evidenced by the taking of a receipt therefor by the Contractor from the Air Carrier or consignee as the case may be. * * *

“9. INSURANCE.

“(a) *Air Freight Insurance*: The Company will assume the liability imposed by law upon the Contractor for risks of loss or delay of, or damage to, air freight, including the liability arising under Contractor's agreement to indemnify the Air Carriers, and the Company, for any such loss, delay, or damage, assumed by the Contractor within the provisions of Section 8(a)(1) hereof, while such air freight is in the custody or control of Contractor,

up to the limits of \$100,000 as respects the contents of any one vehicle and \$250,000 on account of claims arising out of any one loss or disaster. It is the intention and understanding of the Air Carriers, the Company, and the Contractor that this assumption of liability is undertaken for the express purpose of establishing a uniform insurance and claim administration program embracing all motor carrier operators who are Contractors under this and similar Service Contracts with the Company. * * * In consideration of such assumption of liability and the maintenance of such insurance policy by the Company, the Contractor authorizes the Company to deduct and retain from compensation due the Contractor under Section 7 hereof, an amount equal to Two and one-half ($2\frac{1}{2}$) per cent of such compensation."

The court below found as a fact and concluded as a matter of law that Twentieth Century Delivery Service, Inc., negligently dropped and damaged the prototype automatic coffee vending machine in question on July 12, 1954 [Tr. pp. 32 and 35]. Appellant concedes its liability for negligence in this appeal by withdrawing as an assignment of error the trial court's finding and conclusion on the question of negligence (Appellant's Br. p. 9).

The prototype automatic coffee vending machine, which is the subject of this action, was insured by Calnevar Company with St. Paul Fire & Marine Insurance Company, and it was stipulated by the parties that St. Paul Fire & Marine Insurance Company was subrogated to whatever rights in the premises belonged to Calnevar Company [Tr. p. 44]. In addition, it was established by the evidence that St. Paul Fire & Marine Insurance Company paid Calnevar Company in the amount of \$9,625.25,

in satisfaction of its liability under the insurance policy [Tr. p. 91]. Payment of this amount was made pursuant to a report prepared by the Mat Graham Company, dated August 13, 1954 [Deft. Ex. A, Tr. p. 92].

The record shows that the prototype automatic coffee vending machine was invented, designed and patented by the Chief Engineer of Calnevar Company, Harold E. Sloier, whose deposition was read into evidence [Tr. p. 47]. Mr. Sloier testified that if he were to have invested his own money in developing the machine as of the time it was displayed in St. Louis, the total amount would have been between \$75,000 and \$100,000 [Tr. p. 51].

The record further shows that Calnevar Company had sent the prototype automatic coffee vending machine to St. Louis for display and that at the time the machine was damaged there were plans for showing it in other cities for the purpose of either selling the machine outright or creating sufficient interest in potential purchasers to warrant mass production of the machine at a competitive price [Tr. pp. 51 and 52].

The testimony of Mr. Sloier further reveals that the machine was laid-up for repairs for three or four months. Mr. Sloier stated:

“We in the trade say a machine of this type has a shelf life. Once you show it to the trade, you see, you have now shown them your hole card. From thereon on in it is a race between the time you get in production and the time your competitors will pirate items from the machine which are advantageous to them. So during this time it laid in this repair deal we could not show it and he cancelled showings in several cities, Mr. Plotkin did. Finally this machine was sold at a loss, an actual loss, to someone else in this particular area” [Tr. pp. 53 and 54].

ARGUMENT.

The appellee submits that the trial court ruled correctly in holding:

1. That the defendant Twentieth Century was not entitled to the benefit of the declared valuation pursuant to the TWA airbill and Airfreight Rules Tariff No. 1-A.

2. That Calnevar, and thereby the plaintiff, St. Paul Fire and Marine Insurance Company, suffered loss in the amount of \$9,625.25 by reason of damage to the prototype automatic coffee vending machine.

I.

The Defendant, Twentieth Century, Was Not Entitled to the Benefit of the Declared Value Provisions of the TWA Airbill and Airfreight Rules Tariff No. 1-A.

A. Airfreight Rules Tariff No. 1-A, Rules 3.1(b) and 3.1(c), Are Invalid and Ineffective Insofar as They Purport to Limit the Appellant's Liability for Negligence.

The limitation of liability benefits claimed by the appellant under Airfreight Rules Tariff No. 1-A are inapplicable because the governing statute does not authorize airfreight tariffs to control ground services rendered by appellant. (49 U. S. C. A., Secs. 401 *et seq.*)

Section 483 of Title 49 pertains to the functions and powers of the Civil Aeronautics Board in connection with approval and promulgation of tariffs:

“§483. Tariffs of air carriers.

“(a) Every *air carrier* and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for *air transportation* between

points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such *air transportation*. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.” (Emphasis added.)

Section 401 of Title 49, United States Code, defines various terms that are used in regulating civil aeronautics as follows:

“§401. DEFINITIONS.

* * * * *

“(2) ‘Air carrier’ means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

* * * * *

“(10) “Air transportation’ means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.”

There is no evidence in the record nor any claim whatsoever advanced by Twentieth Century that it is or was an air carrier. Appellee contends that under the plain meaning of Title 49, Section 483, there is no statutory authority for an air carrier to file tariffs with the Civil Aeronautics Board purporting to limit the liability of companies which perform ground services. In particular, Section 483 requires “air carriers” to file tariffs showing rates, fares and charges for “air transportation” and no mention is made therein of the filing by an air carrier of tariffs which govern or regulate the conduct of ground services by persons or companies other than the air carriers.

The record is silent as to whether any tariff was filed with the Civil Aeronautics Board which purported to encompass the services rendered by appellant or provide rates therefor. Appellant is not an “air carrier” nor does appellant perform “air transportation” and, therefore, any tariff filed by an air carrier is a nullity with respect to the appellant’s liability for negligence.

This interpretation of Title 49, U. S. C. A., Section 483, is borne out by the decisions in several analogous cases. A leading case on this point is *Shortley v. Northwestern Airlines*, 104 Fed. Supp. 152 (D. C., D. C., 1952). The issue there was whether an air carrier’s tariff, which required notice of injury to be submitted within ninety days and commencement of suit within one year, was binding upon a passenger. The passenger urged that this provision was not a binding term of the contract between him and the airline regardless of its inclusion in the pub-

lished tariff. In construing Title 49, Sections 401 *et seq.*, the court sustained the passenger's contention, holding the limitation void, saying:

“* * * Unquestionably, with respect to rates or matters affecting rates, the character of services to be performed, practices relating to the services to be rendered and matters required by the Civil Aeronautics Act of 1938, 49 U. S. C. A., §401 *et seq.*, or by regulations promulgated by the Civil Aeronautics Board pursuant to said Act, the tariff regulations do as a matter of law control the carrier and the passenger or shipper, and this without any actual notice or knowledge other than the constructive notice afforded by the filing of such tariffs so required. Nowhere, however, in the Act of Congress, or in the regulations promulgated by the Board, is there any authorization or requirement for the inclusion in a tariff of any provision respecting limitation upon notice of claims or upon the time for commencement of actions thereon. Unquestionably, when a lower rate is charged for the transportation of baggage or property, based upon the valuation thereof, than would be charged for its transportation if of greater value, appropriate tariff provisions do affect the rates and charges and are constructive notice to a passenger or shipper. *Where a tariff provision is gratuitously inserted with respect to a matter other than that contemplated or required by the Act of Congress, or the regulations made pursuant thereto, a passenger or shipper is not chargeable with notice as a matter of law with respect thereto.*” (104 Fed. Supp. at 155.) (Emphasis added.)

The case of *Thomas v. American Airlines, Inc.*, 104 Fed. Supp. 650 (E. D. Ark., 1952), reached an identical conclusion on the same issue. The court succinctly stated:

“The limitation period for giving notice and bringing suit in the tariffs of a common carrier are binding upon passengers only if there is a statutory authority for filing such tariff, that is, the statute controlling requires its filing.”

Toman v. Mid-Continental Airlines, Inc., 107 Fed. Supp. 345 (W. D. Mo., 1952), cited the language of Title 49, U. S. C. A., Section 483, and, in reliance upon the *Shortley* case, *supra*, overruled the defendant's motion to dismiss, holding that the limitation of time to sue provided by the tariff was invalid.

To the same effect is *Turoff v. Eastern Airlines, Inc.*, 129 Fed. Supp. 319 (N. D. Ill., 1955).

Another recent case which has denied the validity of a tariff provision limiting the time to sue is *Bernard v. U. S. Air Coach*, 117 Fed. Supp. 134 (S. D. Cal., 1953). Judge Tolin, noting the absence of any appellate court decisions respecting the validity of a gratuitous insertion in a tariff by an air carrier, accepted the reasoning and holding of the *Shortley*, *Thomas* and *Toman* cases, *supra*. The court stated:

“The gratuitous, unilateral act of said defendant in filing what was not required, was entirely ineffectual and this court holds, as to this point, to the same effect as the United States District Court for the District of Columbia in *Shortley v. Northwestern Airlines.*” (117 Fed. Supp. at 142.)

Lichten v. Eastern Airlines, Inc., 189 F. 2d 939 (2nd Cir., 1951), concerned the validity of an air tariff which excused the carrier from any liability for loss of jewelry and other valuables. In an action brought by a passenger for the loss of luggage containing jewelry, the court sustained the airline's defense under the tariff, stating that these rules became a part of a contract between the plaintiff and the carrier. The *Lichten* case is distinguishable from the present appeal in that tariffs were also filed which would have permitted the passenger to declare the luggage value and, by paying an additional fare, secure complete protection against loss. Appellee submits that no such election was afforded the shipper (Calnevar) with respect to the services rendered by appellant in the instant case. In addition, the *Lichten* case concerned the validity of air tariffs applicable to an air carrier, whereas the question in the instant appeal is whether a ground service company can receive the benefits of an air tariff.

The court in the *Lichten* case, while recognizing that Title 49, Section 401, *et seq.*, did not expressly provide for limitation of liability by the carrier, nevertheless noted that such provisions were not prohibited by the statute and concluded that until the Civil Aeronautics Board repudiated such provisions they must be deemed acceptable by the Civil Aeronautics Board and therefore valid. Judge Frank, dissenting, took exception to this line of reasoning and, analogizing to the provisions of the Carmack Amendment to the Interstate Commerce Act, argued that no tariff limitation of liability should be honored in the absence of express authorization in the enacting statute. Regardless of this diversity of opinion, as displayed in the *Lichten* case, appellee submits that there is no room for such argument in the present appeal since this case con-

cerns the liability of a ground carrier which is entirely outside the scope of the controlling statute.

Another persuasive case is *Pacific S.S. Co. v. Cackette*, 8 F. 2d 259 (9th Cir., 1925), certiorari denied 269 U. S. 586 (1926). The court held that an ocean carrier could not evade liability by a tariff provision which required the passenger to file claims within ten days. Not only was there no actual or constructive notice of this term brought to the attention of the passenger, by means of the ticket, but the court further concluded that the tariff which had been filed pursuant to the Shipping Act was only required by that Act to establish just and reasonable rates, fares, and regulations, and that the Act contained no provisions relating to the limitation of time for the presentation of claims. Consequently, the passenger was held not bound by the terms of the tariff.

Southern Pacific Co. v. United States, 272 U. S. 445 (1926), involved the applicability of a special rail freight rate which had been filed by the plaintiff with the Interstate Commerce Commission. Since there was no provision established by law for the filing of a special tariff to govern shipments by the government, it was held that the government could not be bound by such a tariff.

New York, N. H. & H. R. Co. v. Nothnagle, 346 U. S. 128 (1953), decided that the railroad's limitation of liability, which was provided by the Carmack Amendment, was inapplicable as a limitation of liability where the railroad was sued for the loss of luggage by an employee redcap. The court held that the limitation of liability provision as to baggage carried on passenger trains referred solely to free baggage checked through on a passenger fare. It was held that such a limitation could not apply to redcap service, for which the carrier exacted a

separate charge, because the cost of providing such service was not a factor in determining passenger rates. Appellee emphasizes the importance of this holding with respect to the instant appeal, because just as the charge for redcap service had no bearing upon carriage rates in the *Nothnagle* case, neither does the charge for pick-up and delivery service bear any relation to air carriage rates in the present appeal. The essence of appellee's argument is that appellant gave no consideration for a limitation of liability, and that since the air tariff limitation provision was not authorized by law knowledge thereof was not imputed to appellee by the airbill.

**B. Appellant Has Failed to Establish That Airfreight Rules
Tariff No. 1-A Governed Its Activities.**

Rule 3.1(b) states in part, “* * * the tariffs applicable to the shipment shall inure to the benefit of and be binding upon the shipper and consignee and the carrier * * * and shall inure also to the benefit of any other person, firm or corporation performing for the carrier pick-up, delivery, or other ground services in connection with the shipment.” (Emphasis added.) Appellant concludes that this provision and similar language employed in Rule 3.1(c) permit Twentieth Century to limit its liability for negligence. Appellee asserts, however, that these rules warrant no such construction.

The words “* * * the *tariffs* applicable to the shipment * * *” clearly connote that more than one tariff is applicable. Airfreight Rules Tariff No. 1-A is obviously only one of several tariffs to be considered. Appellee maintains that Twentieth Century is not entitled to the declared valuation provision of Airfreight Rules Tariff No. 1-A. If other tariffs are applicable they are not in the record.

The air carriage rate applicable to the shipment carried by TWA in the instant case was \$16.55 per cwt., as shown on the TWA airbill. In addition to their weight-rate charge, there were pick-up and delivery charges of \$1.20 and \$1.47, respectively. The weight-rate charge of \$16.55 per cwt. is a so-called "airport-to-airport" rate and contemplates only the air carriage. This is the rate which is filed by the air carrier with the Civil Aeronautics Board and is the rate upon which is based the declared valuation provision of Airfreight Rules Tariff No. 1-A, Rule 4.3. (*Cf. New York, N. H. & H. R. Co. v. Nothnagle, supra.*)

Appellee submits that the record is silent as to what tariff rules govern ground pick-up and delivery services. Tariff 1-A clearly does not provide for the ground pick-up and delivery charges shown on the TWA airbill. Appellee contends that, absent a showing of the appropriate ground services tariff, there is no justification for appellant to claim the benefits of the airfreight tariff. Appellant has the burden of establishing that the tariff which does govern its activities incorporates a limitation of liability provision. (*Hamilton Foods v. A., T. & S. F. Ry. Co.*, 83 Fed. Supp. 478 (S. D. Cal., 1948), affirmed 173 F. 2d 573 (9th Cir., 1949); *Smith v. Railway Express Agency*, 110 Fed. Supp. 911 (M. D. Tenn., 1953), affirmed 212 F. 2d 47 (6th Cir., 1954).)

**C. Appellant's Argument Ignores the Rational Basis for
Allowing a Carrier to Limit Its Liability for Negligence.**

The Supreme Court has long recognized that a carrier may limit its liability to the declared value of the shipment in consideration for reducing its carriage rates. (*New York, N. H. & H. R. Co. v. Nothnagle, supra*; *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U. S. 28 (1936); *S.S. Ansaldo San Giorgio I v.*

Rheinstrom Bros. Co., 294 U. S. 494 (1935).) The reasoning behind these decisions is that the shipper or passenger is given the benefit of reduced rates and must assume certain risks and hazards in exchange therefor. This policy has congressional sanction under the Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. A., Section 20(11).

Recognizing that reduced carriage rates are the justification for declared valuation provisions, it is entirely unreasonable that Twentieth Century should have its liability for negligence limited by the terms of the TWA airbill. TWA's liability was limited because the shipper agreed to assume the risks and hazards of air carriage in return for reduced rates. There is no showing, however, that Twentieth Century extended a comparable election of rates to Calnevar or that the delivery charge paid by Calnevar signified its acceptance of a limited liability provision.

D. As an Independent Contractor, Rather Than an Agent of TWA, Appellant Cannot Claim Benefits Which Belong to TWA.

Even if this court should reject appellee's reasoning that Twentieth Century is controlled by some tariff other than Tariff No. 1-A, appellee contends that under the terms of the service contract between the air carrier (TWA) and appellant, appellant was an independent contractor and not an agent or employee of the air carrier, and that consequently appellant does not have the status to benefit from the air carrier's limitation of liability. Clauses 3 and 8 of the Air Cargo, Inc. Service Contract are particularly relevant. Clause 3 provides in part, "* * * it being the intention of the parties hereto that Contractor

shall be and remain an independent contractor.” Clause 8 refers to liability and indemnity obligations with respect to relations between Twentieth Century and the air carrier and provides that while the shipment is in the custody or control of Twentieth Century it shall be responsible for loss or damage. Primarily, it is the apparent intention of the parties to negative any agency relationship which could impute the liability of Twentieth Century to the air carrier. It should be equally true that under an independent contractor relationship, Twentieth Century can enjoy none of the benefits accruing under the TWA Airbill or Airfreight Rules Tariff No. 1-A in favor of the air carrier.

E. Appellant's Citations of Case Authority Have No Application to the Issues Raised in This Appeal.

Appellant cites *Texas & Pacific R. Co. v. Leatherwood*, 250 U. S. 478 (1919), which held that the shipper and the connecting rail carriers were bound by the terms of the bill of lading issued by the initial carrier (Appellant's Br. p. 13). However, the *Leatherwood* case was decided solely pursuant to the Carmack Amendment, *supra*, which was enacted to remedy certain problems peculiar to the railroad industry. The primary purpose of the Carmack Amendment was to give a shipper or consignee a cause of action against the initial carrier and to make the terms of the original bill of lading binding upon all other *carriers* who participated in the shipment. It was recognized that several railroads may participate in a given rail movement and that as a matter of public convenience and necessity the shipper should not have the burden of determining which railroad is the most probable defendant in an action for loss or damage of merchandise. Here Twentieth Century is not an air carrier and there is no basis

for analogizing between connecting railroad carriers under the Carmack Amendment and pick-up or delivery truckers who service airline terminals.

The same rationale also explains the cases of *Lyon v. Canadian Pacific R. Co.*, 163 N. E. 180 (Mass., 1928), and *Georgia, Florida & Alabama R. Co. v. Blish Milling Co.*, 241 U. S. 190 (1916), cited by appellant (Appellant's Br. pp. 13, 14-15).

Appellant also cites *Western Transit Co. v. A. C. Leslie & Co.*, 242 U. S. 448 (1917), and *Cleveland, Cincinnati, Chicago & St. Louis R. Co. v. Dettlebach*, 239 U. S. 588 (1916) (Appellant's Br. pp. 13, 15-18). However, these cases merely held that a carrier may claim the benefit of limited liability provisions in a bill of lading during the period in which the carrier acts as a warehouseman at the destination. It is submitted that these cases have no application to the present appeal in that they presented situations where no party other than the carrier had custody and control of the goods. This would be analogous to a situation where the air carrier (TWA) lost or damaged goods in its custody while acting as a warehouseman in the air terminal before or after the air carriage. The question of a carrier's liability under such circumstances is not before the court in this appeal.

Appellant next cites the case of *A. M. Collins & Co. v. Panama R. Co.*, 197 F. 2d 893 (5th Cir., 1952), certiorari denied 344 U. S. 875. This case involved the ocean carriage of goods and was governed by the Carriage of Goods by Sea Act. In this case a stevedore negligently unloaded a freezer from the hold of a vessel and it was held that the stevedore was entitled to the benefits of the bill of lading, including the released valuation clause. However, this case is clearly distinguishable from the

present appeal for several reasons: (1) The Carriage of Goods by Sea Act defines carriage of goods as: “* * * the period from the time when the goods are loaded on to the time when they are discharged from the ship.” Thus the stevedore was handling the goods during the period in which the Carriage of Goods by Sea Act applied and was held entitled to the bill of lading conditions. The case in the present appeal is decidedly different, in that the damage caused by Twentieth Century occurred after the period of air carriage, assuming air carriage is the period from the time when the goods are loaded aboard the airplane to the time when they are discharged. (2) In the *Collins* case it is clear that the stevedores were engaged by the vessel as an accommodation to the vessel, and that charges incurred thereby were absorbed by the vessel. In the instant case, Twentieth Century’s charge was a distinct item on the airbill, separate and apart from the air-freight charge, *i.e.*, not absorbed by the air carrier. (3) The Fifth Circuit treated the stevedore not as an independent contractor but as an agent, and, on this rationale imputed the benefits of the bill of lading to the stevedore. (197 F. 2d at 896.) In the present appeal, it is clearly established in the Air Service Contract that the relationship of Twentieth Century to TWA was that of independent contractor rather than agent.

The dissent in the *A. M. Collins & Co.* case seems particularly noteworthy in urging that an agent who violates a duty to a third party is personally liable to the latter notwithstanding the agency relationship to his principal, and that while there may be vicarious liability imputed to the principal, there is ordinarily not vicarious immunity imputed from the principal to the agent. This argument becomes particularly persuasive when it is recognized in

the present appeal that an independent contractor rather than an agent is the responsible party.

Also, since the case was decided under the Carriage of Goods by Sea Act, the dissent argued that such statutory derogation of the common law must be strictly construed.

Appellant finally cites *Northern Fur Co. v. Minneapolis, St. Paul & S. M. M. R. Co.*, 224 F. 2d 181 (7th Cir., 1955). In this case the Railway Express Agency was the common carrier although the shipment actually moved over the lines of the Soo Railroad. It was held that the Soo was a "carrier handling the shipment" for purposes of receiving the benefit of the released valuation clause in the bill of lading. The court's rationale in this case was that if the plaintiff could recover the full value of the shipment in an action against the Soo, this would permit the plaintiff to reap undue benefits when it had paid the Railway Express a rate based upon the lesser declared value, since the Soo's revenue was directly proportionate to the rate received by the express carrier. Furthermore, as between the express company and the Soo, the express company was liable for the full amount of any judgment paid by Soo. The facts of this case clearly distinguish it from the present appeal and appear to make the *Northern Fur Co.* case entirely unpersuasive.

Appellant next alleges that by the use of the term "any other person" in Airfreight Rules Tariff No. 1-A, Rules 3.1(b) and 3.1(c), it was intended to designate a broad and unrestricted classification of parties who could benefit from the released valuation provisions (Appellant's Br. p. 22). Appellant cites the cases of *City of Buffalo v. Hannah Furnace Corp.*, 305 N. Y. 369 (1953); *Escrow, Inc. v. Borough of Haworth*, 36 N. J. Supp. 469 (1955); *State v. Small*, 111 A. 2d 201 (N. H., 1955); and *State v. Campbell*, 76 Iowa 122 (1888). In not one of these

cases did the court construe the term "any other person" to bring an independent contractor within its meaning. The *City of Buffalo* case merely held that employees of the state were deemed "any other person" for purposes of taking depositions, as provided by the New York Civil Practice Act. The *Escrow, Inc.* case merely construed a city ordinance to permit bidding at public sales by parties other than churches. *State v. Small* and *State v. Campbell* were prosecutions for violations of liquor regulations in which the courts simply refused to follow the canon of *eiusdem generis* in construing the term "any other person" in penal statutes, but, in neither case was the relationship of an independent contractor involved. Appellee contends that these cases are not persuasive in establishing the meaning of "any other person" as used in Tariff No. 1-A and, furthermore, that the intent of the air carrier to encompass a broad class of persons is irrelevant if the governing statute, 49 U. S. C. A., Sections 401 *et seq.*, is violated thereby.

Appellant alleges that Twentieth Century was "handling the shipment" for TWA at the time the coffee vending machine was damaged, citing *International Harvester Co. v. National Surety Co.*, 44 F. 2d 746 (7th Cir., 1930), certiorari denied 282 U. S. 895, and *Employers' Mut. Lia. Ins. Co. of Wisconsin v. Lloyds*, 80 Fed. Supp. 353 (W. D. Wisc., 1948) (Appellant's Br. p. 24). Appellee concedes that TWA had delegated to Twentieth Century the duty of handling the coffee vending machine and that Twentieth Century had custody and control of the machine. Thus there seems to be no question in this appeal that Twentieth Century was "handling the shipment" for TWA when the damage occurred. The issue in this appeal concerns the defense available to Twentieth Century for the consequences of its admitted negligence.

Appellant next contends that Twentieth Century, even though an independent contractor, was acting for TWA with respect to the duty TWA owed the shipper (Appellant's Br. p. 25). Appellant cites five cases for the stated proposition that Twentieth Century was acting for TWA: *Pacific Fire Insurance Company v. Kenny Boiler & Manufacturing Company*, 277 N. W. 226 (Minn., 1937); *H. W. Van Slyke Warehouse Company v. Vilter Manufacturing Company*, 291 Pac. 1103 (Wash., 1930); *Schutte v. United Electric Company*, 68 N. J. L. 435 (1902); *Davidson v. Madison Corporation*, 257 N. Y. 120 (1931); *Huckins Oil Company v. Clampitt*, 224 Pac. 945 (Okla., 1924). Each of these cases, however, merely stands for the elementary principle of contract law that an obligor who delegates his duty of performance to a subcontractor retains primary liability for breach of the contract by the subcontractor. Thus, in each of these cases an obligor-contractor was held liable for the negligent performance of the contract by a delegatee-subcontractor. These cases are entirely outside the issue raised by this appeal, since it is a question of the delegatee-subcontractor's liability presented for decision in this case, and more precisely, whether or not the subcontractor, as delegatee of the duties of the contractor, can rely on any contract defenses which exists in favor of the obligor-contractor. Appellee urges the basic proposition that a delegatee-subcontractor of duties, not being in privity of contract with the obligee, can raise no contractual defenses held by the obligor-contractor, in an action brought by the obligee against the delegatee-subcontractor.

Appellee thus distinguishes the cases cited herein by appellant, and the propositions of law for which they stand, from the facts and applicable law which govern this appeal.

II.

The Evidence Fully Supports the Trial Court's Finding That Calnevar, and Thereby the Plaintiff, St. Paul Fire & Marine Insurance Company, Suffered Loss in the Amount of \$9,625.25 by Reason of the Damage Caused by Twentieth Century to the Prototype Automatic Coffee Vending Machine.

Appellant asserts that the evidence requires a conclusion that the vending machine had expended its usefulness as a prototype and that, therefore, the liability of Twentieth Century should not exceed \$700. There is nothing in the record to justify such a conclusion.

According to the testimony of Mr. Harold Sloier, it was necessary to restore the prototype to its undamaged condition in order to prepare drawings, obtain the necessary tooling, etc., for mass production of the machine [Tr. p. 54]. The fact remains that this machine was still a prototype, and there is no evidence in the record to justify a conclusion that its prototype value was diminished, except insofar as the damage caused by appellant resulted in diminution of value. The mere fact that the record shows that similar machines could be mass produced for approximately \$700 does not warrant the conclusion that Calnevar's damages should be limited to that amount.

Appellant next contends that the payment made by St. Paul Fire & Marine Insurance Company to Calnevar was arbitrary and speculative. This contention is unwarranted in view of the report prepared by the Mat Graham Co. [Deft. Ex. A, Tr. p. 92]. Said report concluded that the most equitable basis for compensating Calnevar for its loss was to figure completion of the job in two

and one-half weeks by five men, which entailed 500 straight-time hours at \$8 per hour, 130 overtime hours at \$12 per hour, and 70 double-time hours at \$16 per hour, plus supervision and expediting expense of \$720. In addition, there were charges for cabinet finishing of \$75; trucking, \$25; plating, \$25; design painting, \$200; making the total physical damage amounting to the sum of \$7,725 [Deft. Ex. A, Tr. p. 99]. This estimate was prepared by fully qualified and competent consulting engineers and appraisers, the Mat Graham Co., and appellee submits that the trial court was entirely justified in accepting the Graham Company's recommendation.

Appellant also states that the record fails to disclose any justification for the inclusion of overtime rates in determining repair costs. However, the testimony of Mr. Sloier clearly indicates that a prototype machine has an uncertain "shelf life" with respect to the novelty of its design [Tr. pp. 53 and 54]. This means that time was of the essence in repairing the prototype in order that Calnevar could realize its reasonable objectives of selling or mass producing the machine [Tr. pp. 53 and 54].

Appellant finally argues that the record does not disclose any damage suffered by Calnevar due to loss of use of the coffee vending machine.

Appellee concedes that the loss-of-use factor, \$1,931.25, was mathematically computed under the insurance policy by taking 25 percent of the damage figure, which was \$7,725. However, damages were determined on the basis of a two and one-half week lay-up period and the

record is clear that three or four months were actually required to complete the repairs [Tr. p. 54]. Under these circumstances, appellee submits that appellant has no cause to complain of the amount of damages allowed for loss of use since the actual loss of use exceeded by several times the loss of use which was computed by the insurance company.

Respectfully submitted,

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No. 15085

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC., a corporation,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The Appellant replies to Appellee's Brief as follows:

I.

A. THE DEFENDANT TWENTIETH CENTURY WAS ENTITLED TO THE BENEFIT OF THE DECLARED VALUATION PROVISIONS.

The Appellee, under Subsection "A" of its Brief, asserts the invalidity of the Rules "as they purport to limit the Appellant's liability for negligence" (Appellee's Br. p. 7). The issue in this case in no way involves a limitation of liability for negligence. The only issue concerns the applicability of declared valuation provisions. The Appellee concedes in principle the validity of these provisions (Appellee's Br. p. 15).

1. Congress, in the Civil Aeronautics Act of 1938, Has Specifically Made Provision for the Filing of Air Carrier Tariffs Applicable to Services in Connection With Air Transportation.

Calnevar contracted for a shipment that necessarily involved the performance of pick-up and delivery services *in connection with air transportation*. The only contract of carriage was TWA Airbill No. 15-STL-993916 [Ex. 2]. This contract, by its clear provisions, required TWA to pick up the shipment in St. Louis and deliver it to Calnevar's door at 1732-42 West Washington Boulevard, Los Angeles, California. The Airbill constituted a door-to-door contract of transportation with TWA.

The Appellee has quoted from Section 483 of Title 49. The Appellant submits that Appellee's quotation of Section 483, Title 49, specifically requires the filing of tariffs by air carriers showing to the extent required by the Civil Aeronautics Board the rules and regulations pertaining *to services performed in connection with air transportation*:

"Sec. 483. Tariffs of air carriers.

"(a) Every air carrier and every foreign air carrier shall file with the Board, * * * tariffs showing all rates, fares, and charges for air transportation between points served by it * * *, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, *and services in connection with such air transportation.*"

By this Congressional wording the clear intent is shown that accessorial services were contemplated in conjunction with air transportation. This intent is further demonstrated by the fact that Congress saw fit to amend Section 203(b) of the Interstate Commerce Act by adopting

Section 1107 of the Civil Aeronautics Act of 1938 (49 U. S. C. 677(j)), which Amendment created an exception from the application of the Interstate Commerce Act for “transportation of persons or property by motor vehicle when incidental to transportation by aircraft” (see 49 U. S. C. 303). The purpose of this Amendment was explained by the Civil Aeronautics Board in the case of *Railway Express Agency Grandfather Certificate*, 2 C. A. B. 531, 538, as follows:

“Moreover, Section 1107(j) amends the motor carrier act to exclude from the regulatory provisions of that act motor vehicle operations which are ‘incidental to transportation by aircraft.’ It is apparent that it was deemed necessary to avoid conflict of jurisdiction between the Board and the Interstate Commerce Commission.”

The fact that motor carrier pick-up and delivery services for air freight is subject to tariff and other requirements of the Civil Aeronautics Act of 1938 has also been fully recognized by the Interstate Commerce Commission.

Hazel Kenny Extension-Airfreight, 61 M. C. C. 588.

2. **The Civil Aeronautics Board, Pursuant to the Statutory Authority, Has Specifically Required the Publication of Air Carrier Tariffs in Connection With Services Accessorial to Actual Air Transportation, Including Pick-up and Delivery Services, and TWA Filed Such Required Tariff.**

The Civil Aeronautics Board, by its tariff regulations, has recognized and made specific requirements in connection with accessorial services, including pick-up and delivery.

TITLE 14, CIVIL AVIATION, CIVIL AERONAUTICS BOARD,
ECONOMIC REGULATIONS, Effective July 1, 1954 (Federal
Register of May 29, 1954).

“Section 221.53

“(a) The tariff shall indicate that rates or fares include pick-up, delivery or other services, explicitly defining the services to be furnished and defining the areas or points between which the services will be performed; or

“(b) * * *

“(c) The tariff shall indicate that the rates or fares apply only from airport to airport but that additional services are furnished subject to additional charges, setting forth the carrier's charges for all other services and other provisions applicable thereto, as required by Sec. 221.38, and the tariff shall clearly and explicitly specify the extent to which such services will be furnished and the areas of points within or between which terminal transportation will be provided.

“Sec. 221.38 Rules and regulations—(a) Contents.

“Except as otherwise provided in this part, the rules and regulations of each tariff shall contain: (3) All of the rates or charges for and the provisions governing terminal services *and all other services which the carrier undertakes or holds out to perform on, for, or in connection with air transportation.*” (Emphasis added.)

“Sec. 221.103. Pick-up, delivery and transfer services.

“If the rules containing rates, charges, and other provisions of the air carrier or foreign air carrier applicable to surface transportation, names, pick-up service at points of origin, delivery service at points

of destination, and transfer service at points of interchange, are voluminous, they may be published in a separate governing tariff * * *.”

The Court may take judicial notice of Federal Register.
44 U. S. C. A., Sec. 307.

The Circuit Court may take judicial notice of a fact not previously called to the attention of a trial court.

Mills v. Denver Tramway Corp., 155 F. 2d 808;

Billie v. Grand Trunk Western Railroad Co., 317 U. S. 481;

Brandes v. Mitterling (Ariz.), 196 F. 2d 464.

Congress, by Title 49, Sections 483 and 303, made provisions for and showed its intention that the Civil Aeronautics Board make provisions for the filing of tariffs by an air carrier in connection with accessorial services. The Civil Aeronautics Board performed its required function and adopted regulations in accordance with Congressional directive and intention by Title 14, Civil Aviation (*supra*). Said regulations required a tariff to be filed by the air carrier in connection with accessorial services, including pick-up and delivery services.

TWA, the air carrier involved in this litigation, filed such a tariff and that tariff expressly states that it is governed by the TWA Rules Tariff [Ex. 3].

The contract between Calnevar and TWA for door-to-door shipment was admitted into evidence by stipulation [Tr. p. 41; Ex. 2]. This contract provided

“it is mutually agreed that goods herein described are accepted * * * for transportation as specified herein, *subject to governing classifications and tariffs* * * *. Such classifications and tariffs,

copies of which are available for inspection by parties hereto, are hereby incorporated into and made a part of this contract.”

By this contract, Calnevar had constructive notice of all tariffs filed by TWA applicable to the shipment. In the case of *Shortley v. Northwestern Airlines*, 104 Fed. Supp. 152, cited and quoted with approval by the Appellee as a leading case (Appellee’s Br. p. 9), the rule was stated as follows:

“Unquestionably, when a lower rate is charged for the transportation of baggage or property based upon the valuation thereof than would be charged for its transportation if of greater value, appropriate tariff provisions do affect and are *constructive notice to a passenger or shipper*.” (Emphasis added.)

Boston & Main Railroad v. Hooker, 233 U. S. 97, 58 L. Ed. 868.

In addition to Airfreight Rules Tariff No. 1-A, in evidence, TWA also had on file its tariff entitled “Official Airfreight Pick-up and Delivery Tariff No. 3”. This tariff was by its terms incorporated into and made a part of Tariff No. 1-A. By the Airbill contract, in evidence by stipulation, the shipment was subject to both TWA tariffs No. 1-A and 3, and Calnevar had constructive notice of each.

The Court can take judicial notice of the Official Airfreight Pick-up and Delivery Tariff No. 3 filed by TWA.

Mills v. Denver Tramway Corp., 155 F. 2d 808;

Billie v. Grand Trunk Western Railroad Co., 317 U. S. 481;

Brandes v. Mitterling (Ariz.), 196 P. 2d 464.

The Appellant intends to file, under separate cover, copies of the Federal Register of May 29, 1954, heretofore referred to, and the Official Airfreight Pick-up and Delivery Tariff No. 3 herein referred to, for the convenience of the Court.

Should the Court feel that either of these documents are not properly before the Court, the Appellant would ask opportunity to have these documents incorporated in the record.

3. **The Declared Valuation Provisions of TWA Tariffs Do Apply to Appellant, Twentieth Century.**
- (a) **The TWA Tariffs Specifically Provided That the Declared Valuation Provisions Were Applicable to Persons Performing the Accessorial Services for the Air Carrier and That Such Tariff Provisions Were Duly Filed With and Not Rejected by the Civil Aeronautics Board.**

The Appellee concedes the validity of declared valuation in principle (Appellee's Br. p. 15).

Had the delivery in this instance been made directly by TWA's employees and trucks, there is no question but what the declared valuation would apply. (*Lichten v. Eastern Airlines*, 189 F. 2d 939, 25 A. L. R. 2d 1337, 1951 U. S. Av. 310.) The contract for carriage was with TWA and called for transportation from St. Louis, Missouri, to 1732-42 West Washington Boulevard, Los Angeles, California. The charges for transportation and delivery were an obligation owed by Calnevar exclusively to TWA [Ex. 2].

The Airfreight Rules Tariff No. 1-A, Rule No. 3.1(a) [Ex. 3] provided as follows:

“*Each shipment*, irrespective of the form of shipping document or memorandum accepted by the carrier in connection therewith, shall be subject to the carrier’s tariffs in effect on the date of acceptance of such shipment by the carrier.”

The service contracted for by TWA is a door-to-door service, just as rail express, less than carload rail freight, and motor freight service is a door-to-door service. The *shipment* was governed by the tariffs. The tariff specifically provided that the benefit of the tariffs, including the declared valuation, should inure to anyone performing a ground service that was an obligation of the carrier. As a door-to-door contract of carriage shipment, Twentieth Century was performing a pick-up service for the air carrier, TWA, at the time the damage occurred.

The Rule No. 3.1(b) clearly and unequivocally states that the Airbill and tariffs applicable to the *shipment* shall inure *also* to the benefit of any person performing the pick-up and delivery.

Rule No. 3.1(c) provides that the Airbill and the tariffs applicable to the *shipment* shall apply at all times when the *shipment* is being handled by or *for* the carrier, including the period while the shipment is being handled in pick-up or delivery by any person performing such services for the carrier.

The Airbill, which was a contract of door-to-door shipment, provided for declared valuation [Ex. 2]. There can be no question but that Rule No. 4.3 of the Airfreight Rules Tariff providing for a declared valuation was a part of the TWA tariffs [Ex. 3].

The Appellee concedes that Twentieth Century was “handling the shipment” for TWA when the damage occurred (Appellee’s Br. p. 21).

It is difficult for the Appellant to understand how the assertion could be made by the Appellee that the wording of such provisions do not warrant the construction that the benefit of the tariffs inured to Twentieth Century, who was performing a delivery service in the course of door-to-door shipment when the damage occurred.

As heretofore demonstrated, Calnevar had constructive notice of the TWA tariffs.

In any event, the matters involved herein are questions of reasonable necessities of rates and practices and the Appellee cannot collaterally assert the invalidity of tariffs accepted by the Civil Aeronautics Board.

In the case of *Lichten v. Eastern Airlines, Inc.*, 189 F. 2d 939, 25 A. L. R. 2d 1337, at page 1342, the Court states:

“It is well settled that questions of the reasonableness of rates and practices are to be left to the administrative agency in the first instance and that under this doctrine of ‘primary jurisdiction’ *the provisions of a tariff properly filed with the Board and within its authority are deemed valid until rejected by it.*” (Emphasis added.)

Boston & Maine Rd. v. Hooker, 233 U. S. 97,
58 L. Ed. 868;

Texas & Pacific Railway v. Abilene Cotton Oil Co.,
204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553;

Civil Aeronautics Board v. Modern Air Transport,
179 F. 2d 622.

(b) Even Apart From the Tariff Rule, by the Provisions of the Contract Between TWA and Twentieth Century (Through Air Cargo) [Ex. 4] and by Law Twentieth Century Was an Agent and Was Entitled to the Benefit of the Immunities of TWA While Acting Within the Scope of Its Authority.

The Appellee concedes that TWA had delegated to Twentieth Century the duty of handling the coffee machine and that Twentieth Century had custody and control of the machine. The Appellee further concedes that Twentieth Century was *handling the shipment* for TWA when the damage was done (Appellee's Br. p. 21).

Section I of the service contract contains the following definition:

"The term 'air freight' as used herein means any property (except such as is hereinafter specifically excluded) accepted for or on behalf of an air carrier for transportation *in accordance with and subject to the published tariffs of such air carrier*" [Ex. 4].

These provisions of the contract specifically made the accessorial services performed by Twentieth Century subject to the published tariffs of TWA. A reading of this provision clearly indicates that Twentieth Century was subject to specific instructions of TWA.

Section II of the service contract provides in part as follows:

"The contractor will pick up, accept, deliver, re-deliver, and transfer air freight and issue and/or obtain all necessary shipping documents, receipts, notices, and collect charges in connection therewith in accordance with . . . specific instructions received from the particular air carrier concerned."

By the terms of Section II of the service contract TWA not only retained the right of control, but also provides for specific instructions in connection with pick-up and delivery.

Section 13(c) of the service contract provided as follows:

“13(c). Contractor and contractor’s officers, agents, employees and subcontractors are hereby expressly authorized to act on behalf of and in the name of the air carrier concerned when transacting business, incidental to and in the course of performance of any of the services or duties to be performed by contractor as herein provided, with shippers and consignees of air freight.”

These provisions of the contract clearly authorize Twentieth Century to act for and on behalf of TWA in this instance.

By the contract Twentieth Century agreed to perform accessorial services in connection with pick-up and delivery of air freight under the control of the specific instructions of TWA and subject to the express authority given by TWA for Twentieth Century to act for and on behalf of TWA.

The only logical conclusion that can be drawn from the four corners of the service contract is that Twentieth Century was an authorized agent of TWA. The insertion of the bald statement in the contract that Twentieth Century was an independent contractor, evaluated by all of the terms of the contract, can amount to nothing more than an improper legal conclusion of the parties.

Twentieth Century was entitled, as an agent doing an act for TWA, to TWA's immunities. Section 347, Restatement of Agency, provides as follows:

“An agent who is acting in pursuance of his authority has such immunities of the principal that are not personal to the principal.”

In any event, the doctrine of independent contractor, by definition, can have no application to the issues in this case.

The doctrine of independent contractor is a legal concept whereby a principal or employer may insulate himself from liability to certain parties under certain conditions.

“The doctrine of non-liability for the acts or omissions of an independent contractor or his servant is founded on the principle that one person should not be compelled to answer for the fault or neglect of another over whom he has no control and that the employer has the right to rely upon the presumption that the contractor will discharge his legal duties owing to his employees and third persons.”

57 C. J. S. 355, Sec. 584.

Reduced to its barest fundamentals, the doctrine is invoked when the injured third party attempts to rely on the doctrine of *respondeat superior*, and principal or employer says that in spite of the fact this party was doing an act or service for me, you cannot attach liability to me. The Appellant has searched and has not discovered any cases in which any party other than the employer or a principal was able to assert the doctrine. The Appellee obviously is not in a position of employer or principal as respects the involved transaction. The Appellee is the injured party. Appellee would assert

that because TWA could have asserted, founded or unfounded, a defense of independent contractor for the purposes of immunity to liability, that such circumstance can affect the relationship between the Appellee and the agent Twentieth Century. The Appellant has not been able to find any case of such application of the doctrine. Appellant asserts that the only cases which the Appellant has discovered involved the use by the principal of the doctrine as a shield to liability.

The inapplicability of the doctrine of independent contractor becomes especially apparent in this case where, under the cases previously cited by the Appellant (Appellant's Op. Br., p. 25), TWA would not be able to raise the shield of immunity of independent contractor due to the reason that the doctrine has no applicability between contracting parties. In these circumstances, any discussion of independent contractor to the issues in this case can amount to nothing more than a smoke screen.

The inapplicability of the doctrine of independent contractor to the facts of this case is specifically enunciated in the case of *Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co.*, 224 F. 2d 181, heretofore cited, page 25, Appellant's Opening Brief.

(c) Even Apart From the Tariff Rule and the Doctrine of Agency, the Provisions of the Original Contract of Carriage for a Through Shipment Extend to All Carriers Participating in the Through Movement.

As heretofore demonstrated, there can be no question but what the contract of carriage in this case was a door-to-door shipment. Without belaboring the authorities heretofore submitted to this Court, the Appellant refers to and asserts that the following cases establish that the

provisions of the original contract of carriage extend to all carriers participating in a through movement.

Texas & Pacific Railway Co. v. Leatherwood (1919), 250 U. S. 478, 63 L. Ed. 1096, 39 S. Ct. 517;

Lyon v. Canadian Pacific Railway Co., 163 N. E. 180, 60 A. L. R. 1247;

Western Transit Co. v. A. C. Leslie & Co., 242 U. S. 448, 61 L. Ed. 423 (Appellant's Op. Br., p. 13);

Georgia, Florida & Alabama Railway Co. v. Blish Milling Co., 231 U. S. 190, 60 L. Ed. 948 (Appellant's Op. Br., p. 14);

A. M. Collins & Co. v. Panama Railway Co., 197 F. 2d 893, 97 L. Ed. 677, 344 U. S. 875, 73 S. Ct. 168 (Appellant's Op. Br., p. 18);

Northern Fur Co., Inc. v. Minneapolis, St. Paul & S. M. M. Ry. Co., 224 F. 2d 181 (Appellant's Op. Br., p. 20).

4. The Appellee's Cases in Support of Its Contention of Invalidity and Ineffectiveness Do Not Support the Appellee's Contention or Apply to Cases Involving the Carriage of Property Such as Was Being Performed by the Defendant Twentieth Century in This Instance.

The following cases cited by the Appellee represent cases in which the filed tariffs were not effective because they were beyond the scope of the law or regulations.

Shortley v. Northwestern Airlines, 104 Fed. Supp. 152;

Thomas v. American Airlines, Inc., 104 Fed. Supp. 650;

Toman v. Mid-Continental Airlines, Inc., 107 Fed. Supp. 345;

Turoff v. Eastern Airlines, Inc., 129 Fed. Supp. 319;

Bernard v. U. S. Air Coach, 117 Fed. Supp. 134;

Pacific S.S. Co. v. Cackette, 8 F. 2d 259.

The doctrine of the above cases cited by Appellee is not authority in the case at bar in that, as has heretofore been demonstrated, there is statutory and Civil Aeronautics Board authority for the filing of the declared valuation provision of the TWA tariff. Each of the above cited cases submitted by the Appellee involve claim procedure or other matters in connection with personal injury. As respects air tariffs, the Civil Aeronautics Board has acknowledged the rule of the above cases as respects personal injury and prohibits by its regulations any applicable tariffs stating any limitations or conditions in connection with carrier's liability for personal injury or death.

221.38(h) Title 14—Civil Aviation, Civil Aeronautics Board, Economic Regulations, Effective July 1, 1954, Federal Register of May 29, 1954:

“(h) *Personal liability rules.* No provision of the Board's regulations issued under this part or elsewhere shall be construed to require on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms.”

The leading case (Appellee's Br., p. 9), *Shortley v. Northwestern Airlines*, held that requirements in con-

nection with notice of injury were invalid. The decision further stated as follows:

“Unquestionably, when a lower rate is charged for the *transportation of baggage* or property based upon the valuation thereof than would be charged for its transportation if of greater value, appropriate tariff provisions do affect the rates and charges and are constructive notice to passenger or shipper.” (Appellee’s Br., p. 10; Emphasis added.)

This case acknowledges the differential between the rules and regulations applying to personal injury in air transportation and the tariff rules and regulations applying to the carriage of property.

In the case of *Southern Pacific Co. v. United States*, cited by the Appellee, the factual circumstances are such that the attempted filed tariff in connection with government shipment was not authorized as a special classification, and could not under the law and the regulations be said to comply in any way.

In the case of *New York, N. H. & H. R. Co. v. Nothnagle*, cited by the Appellee, the fact is that the court recognized the service of the red cap involved as an air transportation accessorial service.

The Court stated:

“We have little doubt that the transaction was an incident to an interstate journey within the ambit of the Interstate Commerce Act and neither continuity of interstate movement nor isolated segments of the trip can be decisive. ‘The actual facts govern, for this purpose, the destination intended by the passenger when he begins his journey and, known to the carrier, determines the character of commerce.’ ”

Because of value of the property and other incidents and circumstances the court determined that the limitation did not apply and stated:

“but the facts here do not bring the case within the statutory conditions.”

The Appellant, in its Opening Brief, cited the *Lichten v. Eastern Airlines, Inc.*, case, and under this section the Appellee has attempted to distinguish that case on the basis that the tariffs there involved permitted the passengers to declare a value by paying an additional fare. Appellee asserts that Calnevar was not offered any such election. Rule No. 4.3 of the Air Tariff, Subsection (a) 3, specifically afforded to Calnevar the election concerning which the Appellee complains [Ex. 3].

In the case of *Northern Fur Co. v. Minneapolis, St. Paul & S. M. M. R. Co.*, 224 F. 2d 181, heretofore cited in the Appellant's Opening Brief, the Court stated:

“In the case at bar all carriers handling the shipment participate in the cost of rendering the service and the revenue in connection therewith. It would be unfair and contrary to public policy enunciated by Congress to permit the plaintiff to recover \$10,-444.50 when, by its declaration, a value of \$2,000.00, it has enjoyed the benefit of a lower transportation charge credited upon the low declared value.”

Calnevar had the same election as to transportation rates and declared valuation with TWA as Lichten had with Eastern Airlines.

**B. AIRFREIGHT RULES TARIFF NO. 1-A AND THE
TARIFFS OF TWA DO REGULATE AND APPLY
TO THE APPELLANT.**

As heretofore indicated, the shipment involved was a door-to-door shipment and the terms of Airfreight Rules Tariff No. 1-A clearly apply to the Appellant. The Appellee would argue that because of a possibility that another tariff might apply, the Airfreight Rules Tariff No. 1-A is voided. Even if such an assertion were logical, the fact of the matter is that TWA did have on file its Tariff No. 3 entitled "Official Airfreight Pick-up and Delivery Tariff No. 3," which pick-up and delivery Tariff is governed by Tariff No. 1-A, in evidence [Ex. 3], except as to the specific matters set forth in Tariff No. 3. The provisions in Tariff No. 3 so providing, refer to Tariff No. 1. Tariff No. 1-A, under the caption "Cancellation Notice," supersedes Tariff No. 1 [Ex. 3].

In Airfreight Pickup and Delivery Tariff No. 3 no specific reference is made to declared valuation or the matters set forth in Rule No. 3.1(b) and 3.1(c) of the Airfreight Rules Tariff, the result being that the Airfreight Rules Tariff No. 1-A, Rules 3.1(b) and 3.1(c) and 4.3 govern and require the application of the declared valuation in this instance.

As heretofore demonstrated, Calnevar had constructive notice of TWA Tariffs Nos. 1-A and 3, and, in any event, the Court can take judicial notice of said tariffs.

Mills v. Denver Tramway Corp., 155 F. 2d 808;

Billie v. Grand Trunk Western Railroad Co., 317
U. S. 481;

Brandes v. Mitterling, 196 P. 2d 464 (Ariz.).

In any event, this is a through shipment in which Calnevar contracted exclusively with TWA and the obligation for the payment of the air transportation, the pick-up and delivery was owed by Calnevar exclusively to TWA.

As heretofore demonstrated, Airfreight Rules Tariff No. 1-A specifically provided that the benefit of the Airbill and the rules of TWA were to extend to any person performing services for TWA or handling the shipment. As heretofore pointed out, Twentieth Century was performing delivery service for TWA and was so handling the shipment at the time of the damage.

C. THE RATIONALE OF INTERSTATE COMMERCE ACT AND THE UNIFORMITY OF RULES AND REGULATIONS COMPEL THE APPLICATION OF THE DECLARED VALUATION TO THE SHIPMENT, UNAFFECTED BY THE RELATIONSHIP OF THE PARTIES.

The effect of filing schedules of rates with the Interstate Commerce Commission is to make the published rates binding upon the shipper and carrier alike, thus making effectual the purpose of the act to have but one rate open to all alike and from which there can be no departure. The declared valuation filed and posted as a part of the tariff became and was an essential part of the filed rate.

Boston & Maine Railroad Co. v. Hooker, 233 U. S. 97, 58 L. Ed. 868.

The Appellee, in recognizing the general principle of declared valuation (Appellee's Br., p. 16), without authority states that it is unreasonable to have the tariff apply to the shipment and asserts that the only reasonable way to have it apply would be to determine in each instance

the relation of the parties to the specific transaction. Appellant submits that any such rule must in its application defeat the announced purpose of the rate regulations by the Interstate Commerce Commission, namely to have but one rate open to all alike and from which there could be no departure.

D. THE DOCTRINE OF INDEPENDENT CONTRACTOR, BY DEFINITION, CAN HAVE NO APPLICATION TO THE ISSUES IN THIS CASE, AND, IN ANY EVENT, TWENTIETH CENTURY WAS AGENT FOR TWA IN MAKING DELIVERY OF THE INVOLVED PROPERTY.

The Appellant submits by reference Section A3(b) of this Brief in answer to Appellee's contentions under this subsection and in support of the Appellant's principles above stated.

E. THE APPELLEE HAS FAILED TO DISTINGUISH THE APPELLANT'S CITATIONS.

The Appellee would distinguish the *Texas & Pacific Railway Co. et al. v. Leatherwood* case, 250 U. S. 478, on the basis that the case was decided under the Carmack Amendment. In the case of *Kansas City Southern Railway Co. v. Carl*, 227 U. S. 639, 57 L. Ed. 683, the Supreme Court held that any limitation of liability in a contract made by an initial rail carrier of interstate shipment which would be valid on its own behalf would inure to the benefit of any succeeding carrier in the chain of transportation and, reaching this conclusion the Supreme Court of the United States reversed the Supreme Court of Arkansas, which had taken the position that the Carmack Amendment had changed the common law rule in this respect. The Supreme Court held that the

common law rule continued to apply, despite the Carmack Amendment.

In the two following cases antedating the Interstate Commerce Act itself, the Supreme Court upheld limitation of liability in a bill of lading made by an initial carrier and extended the benefit of limitation to all connecting carriers.

Evansville & C. R. Co. v. Andros Coggin Mills,
89 U. S. 594, 22 L. Ed. 724 (1874);

Derring v. Norfolk & W. R. Co., 21 Fed. 25
(1874).

The Appellee would attempt also to distinguish the *Texas* case on the basis that the airport terminal in the air transportation becomes such an incident in the overall shipment, in spite of the fact that the Airbill calls for complete shipment from St. Louis to Washington Boulevard, that the shipment loses all characteristics of interstate commerce and the applicability of the duly enacted Interstate Commerce Act and the regulations of the Civil Aeronautics Board in connection therewith. The Appellant submits that as an incident of door-to-door transportation an airport terminal has no more peculiarities to it than the termination yards of a particular railroad where the goods being transported come to rest and must be thereafter carried by another carrier.

The Appellee would dispose of the *Lyon* and *Georgia, Florida & Alabama R.* cases in like manner as the *Texas* case and the Appellant submits his argument hereto advanced in connection with the *Texas* case.

The cases of *Western Transit Co.* and *Cleveland, Cincinnati, Chicago & St. Louis R. Co.* are admitted by the Appellee to stand for the proposition that the benefit of

declared valuation can extend itself to activities the nature of which is different than that involved in the basic transportation. The Appellant submits that this is the wording and intent of the Interstate Commerce Act and that the applicability of the tariffs is determined solely by whether the goods are in the course of interstate *shipment*.

The Appellee would distinguish the *A. M. Collins* case on the basis (1) that the Carriage of Goods by Sea Act extends and is applicable to activities with the goods until they are discharged from the ship, and (2) that the stevedores involved were engaged by the vessel as an accommodation to the vessel and the charges incurred thereby were absorbed by the vessel.

By the Airbill involved in this transaction, delivery was required to be made on Washington Boulevard in Los Angeles, California. It was not to be expected that an airplane would make the final delivery. The tariffs and the Civil Aeronautics Board Regulations, and the Interstate Commerce Act all contemplated motor vehicle transportation. Like the Carriage of Goods by Sea Act, the Civil Aeronautics Act involved in this situation contemplated a discharge of the goods on Washington Boulevard.

The only charge indicated for the air carriage, pick-up or delivery is incurred and owed to TWA, who holds a similar position to the vessel in the *A. M. Collins* case.

In the case of *Northern Fur Co. v. Minneapolis, St. Paul & S. M. M. R. Co.* the ultimate holding of the court was that a railroad was entitled to the benefits of a railway express declaration of value for the reason that the rate of transportation was based upon a lesser declared value. The court specifically states that the shipment "has enjoyed the benefit of a lower transportation charge credited upon the low declared value."

II.

THE EVIDENCE FAILS TO SUPPORT THE TRIAL
COURT'S FINDING OF DAMAGES.

In answer to the Appellee's assertion in connection with damages, the Appellant refers to the arguments set forth in the Appellant's Opening Brief and the Appellant again asserts that the proof of damage in this case is not realistic and is speculative. The Appellant cites the following incompatible contentions in the Appellee's Brief as further examples of the lack of any evidence other than speculative in support of damages.

- (1) That the reasonable basis for the calculation of the physical damage to the machine required the application of a two and one-half week repair period in which to complete the machine, which period required the inclusion of overtime payment in the loss calculation.
- (2) That the loss of use factor of \$1931.25, unsupported by any legal evidence, was justified by the mere fact that Calnevar took three to four months to repair the machine.

Respectfully submitted,

GENE E. GROFF,

Attorney for Appellant.



No. 15,085.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC.,

Appellant,

v's.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a
corporation,

Appellee.

PETITION FOR MODIFICATION OF OPINION.

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FILED

FEB 20 1957

PAUL P. O'BRIEN, C

No. 15,085.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TWENTIETH CENTURY DELIVERY SERVICE, INC.,

Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a
corporation,

Appellee.

PETITION FOR MODIFICATION OF OPINION.

This Honorable Court by its opinion filed January 24, 1957, reversed the judgment previously entered in the United States District Court for the Southern District of California against Appellant, Twentieth Century Delivery Service, Inc.

It is respectfully submitted the Court erred in concluding that Twentieth Century Delivery Service, Inc. had tendered to Appellee, St. Paul Fire and Marine Insurance Company the sum of One Hundred Twenty-Two Dollars and Fifty Cents (\$122.50) covering the limited valuation of the shipment in question (Opinion p. 2).

The tender of payment was made by the co-defendant Trans-World Airlines, Inc. on January 7, 1955, and rejected by St. Paul Fire and Marine Insurance Company

on January 10, 1955 [Tr. pp. 42]. The answers to the amended complaint of both Trans-World Airlines, Inc., and Twentieth Century Delivery Service, Inc. denied any liability whatsoever to the plaintiff [Tr. pp. 19, 27].

Appellee maintains it is entitled to at least judgment in its favor and against Twentieth Century Delivery Service of One Hundred and Twenty-Two Dollars and Fifty Cents (\$122.50) together with its costs of suit.

It is requested the Court's opinion be modified accordingly.

Respectfully submitted,

LILLICK, GEARY, McHOSE, ROETHKE &
MYERS,

GORDON K. WRIGHT,

By GORDON K. WRIGHT,

*Attorneys for St. Paul Fire and Marine
Insurance Company.*

Certificate of Counsel.

I, Gordon K. Wright, of counsel for appellee in the above entitled action, hereby certify that the foregoing Petition for Modification of Opinion in this case is presented in good faith and not for delay, and in my opinion is well-founded in law and in fact and proper to be filed herein.

GORDON K. WRIGHT,

Attorney for Appellee.

No. 15086

United States
Court of Appeals
for the Ninth Circuit

LEWIS H. SAPER, as Trustee in Bankruptcy of
Riverside Iron & Steel Corporation,

Appellant,

VS.

THOMAS A. WOOD,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

JUN 19 1956

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

No. 15259-T

LEWIS H. SAPER, as Trustee in Bankruptcy of
the Estates of RIVERSIDE IRON AND
STEEL CORPORATION and HARLAN H.
BRADT, Bankrupts,

Plaintiffs,

vs.

THOMAS A. WOOD,

Defendant.

CLAIM UNDER BANKRUPTCY ACT

Plaintiff alleges:

1. Plaintiff, Lewis H. Saper, as Trustee in Bankruptcy of Riverside Iron and Steel Corporation, hereinafter referred to as "Riverside" and Harlan H. Bradt, hereinafter referred to as "Brandt," bankrupts, brings this action under Sections 60b and 67a of the Act of Congress relating to Bankruptcy.

2. On information and belief, that Riverside is a stock corporation duly organized and existing under the laws of the State of Nevada.

3. That said Riverside filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, on or about the 14th day of March, 1951, and such proceedings were thereafter had that it was duly adjudicated a bankrupt.

4. That on or about the 13th day of January, 1953, plaintiff was duly appointed Trustee in Bankruptcy of Riverside, thereafter duly qualified, and is still functioning as such Trustee. [2*]

5. That the said Bradt filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, on or about the 10th day of July, 1951, and such proceedings were thereafter had that he was duly adjudicated a bankrupt.

6. That on or about the 31st day of July, 1951, plaintiff was duly appointed Trustee in Bankruptcy of Bradt, thereafter duly qualified, and is still functioning as such Trustee.

7. That by an order of the United States District Court for the Southern District of New York, dated December 17, 1952, upon notice to all of the creditors of said bankrupts, the said bankruptcy proceedings were duly consolidated.

8. On information and belief, that on or about the 20th day of November, 1950, Harold J. Ostly, as Clerk of the Superior Court of the State of California, Los Angeles County, and/or as County Clerk of Los Angeles County in said State of California, held a sum in excess of \$160,000 for Riverside and Bradt.

9. On information and belief, that on or about the 20th day of November, 1950, and within four months of the filing of the voluntary petition in Bankruptcy of Riverside, the defendant caused a

writ of execution to be served upon said Harold J. Ostly, either as County Clerk or as Clerk of the Superior Court, and purported thereby to obtain a lien upon said funds, and thereafter said Ostly on the 21st day of December, 1950, transferred certain of the said funds of the bankrupt Riverside to the defendant in satisfaction of an antecedent debt of the bankrupt Riverside.

10. On information and belief, that the said transfer on the said 21st day of December, 1950, was in the sum of \$5,839.49 in cash then held by the said County Clerk for said bankrupt Riverside.

11. That the effect of said transfer and purported lien was to enable the said defendant to obtain a greater percentage of his debt than any other creditors of said bankrupt or bankrupts in [3] the same class.

12. That at the time of the said purported lien and transfer, the said Riverside and Bradt were insolvent and on information and belief, that the defendant, or his agents acting with reference thereto, had knowledge or reasonable cause to believe that the said Riverside and Bradt were insolvent.

Wherefore, plaintiff demands:

- (a) That the said writ of execution be set aside;
- (b) That the said transfer be set aside;
- (c) That the plaintiff have judgment against the defendant for the sum of \$5,839.49, with interest; and

(d) That the plaintiff have judgment against the defendant for costs.

LOUIS M. BROWN, and
ALEX DENNY FRED,
Attorneys for Plaintiff.

By /s/ ALEX DENNY FRED.

[Endorsed]: Filed March 2, 1953. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Thomas A. Wood and answering plaintiff's complaint admits, denies and alleges as follows, to wit:

I.

Answering paragraph 3 of plaintiff's complaint, defendant admits that on or about the 14th day of March, 1951, Riverside Iron and Steel Corporation, a corporation organized and existing under and by virtue of the laws of the State of Nevada, filed in the United States District Court for the Southern District of New York, a voluntary petition in bankruptcy, but said answering defendant denies that on the 14th day of March, 1951, or at any time or at all, that said Riverside Iron and Steel Corporation, a corporation, was or now is insolvent.

II.

Answering paragraph 8 of plaintiff's complaint, defendant denies generally and specifically each and

every allegation therein [5] contained except that the defendant admits that on or about the 20th day of November, 1950, Harold J. Ostly, as Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, held in his possession the sum of \$82,619.69, which said sum was payable to LeRoy B. Lorenz pursuant to an assignment duly and regularly made by the Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt, assigning to the said LeRoy B. Lorenz all the proceeds payable to the said Riverside Iron and Steel Corporation, a corporation and Harlan H. Bradt payable by reason of the judgment entered in the Superior Court of the State of California, in and for the County of Los Angeles in an action styled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, Harlan H. Bradt et al., defendants, numbered 520858, and denies that on or about the 20th day of November, 1950, or at any time or at all subsequent to the assignment as above alleged, the said Riverside Iron and Steel Corporation, a corporation, or Harlan H. Bradt had any right, title or interest in or to any moneys held by Harold J. Ostly, as Clerk of the Superior Court of the State of California, in and for the County of Los Angeles pursuant to the deposit of moneys made in said action styled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, Harlan H. Bradt et al., defendants.

III.

Answering paragraph 9 of plaintiff's complaint, defendant denies that on or about the 20th day of

November, 1950, and within four months of the filing of the voluntary petition in bankruptcy of Riverside Iron and Steel Corporation, a corporation, defendant caused a writ of execution to be served upon the said Harold J. Ostly, either as County Clerk or as Clerk of the Superior Court, and that the said defendant purported thereby to obtain a lien upon said funds, and that the said Ostly thereafter, pursuant to a writ of execution issued on the 20th day of November, 1950, did [6] on the 21st day of December, 1950, transfer certain funds of the said Riverside Iron and Steel Corporation, a corporation, to the defendant in satisfaction of the antecedent debt of the said Riverside Iron and Steel Corporation, a corporation, and in that behalf plaintiff alleges that on or about the 13th day of December, 1946, in an action then pending in the Superior Court of the State of California, in and for the County of Los Angeles, styled Thomas A. Wood, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, defendant, and numbered 522,523, an attachment was issued and served upon E. T. Foley, the plaintiff in the above-mentioned action, attaching all moneys, credits or other properties of the Riverside Iron and Steel Corporation, a corporation, in the hands of the said E. T. Foley or in his possession or under his control; that on or about the 27th day of April, 1948, in the action entitled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, Harlan H. Bradt et al., defendants, numbered 520858, pending in the Superior Court of the State of California, in and for the County of Los Angeles,

the plaintiff, E. T. Foley and the defendants, Riverside Iron and Steel Corporation, a corporation and Harlan H. Bradt and their respective counsel of record entered into a stipulation which stipulation, among other things, set forth that there had been served upon the said E. T. Foley in the action styled Thomas A. Wood, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, an attachment in the amount of \$4,012.09 besides interest at the rate of 7% per annum from the 27th day of June, 1944, and costs of suit, and that said moneys in the hands of the said E. T. Foley belonging to the Riverside Iron and Steel Corporation, a corporation, were subject to said writ of attachment; that following the entering into of said stipulation, E. T. Foley deposited with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, for the account of Riverside [7] Iron and Steel Corporation, a corporation, subject to the liens of the writs of attachment then outstanding against said money, the sum of \$82,619.69; that the lien of the defendant in this action, Thomas A. Wood, attached to said fund on the 13th day of December, 1946.

IV.

Answering paragraph 10 of plaintiff's complaint, defendant denies that the said transfer on the 21st day of December, 1950, was of any funds held by the County Clerk on said date for Riverside Iron and Steel Corporation, a corporation, or Harlan H. Bradt.

V.

Answering paragraph 11 of plaintiff's complaint, defendant denies that the effect of said transfer of funds by the County Clerk on or about the 21st day of December, 1950, to the Sheriff of Los Angeles County was to enable or did enable the defendant to obtain a greater percentage of his debt than any other creditors of said bankrupt or bankrupts in the same class.

VI.

Answering paragraph 12 of plaintiff's complaint, the defendant denies that on or about the 20th day of November, 1950, or on or about the 21st day of November, 1950, the defendant Riverside Iron and Steel Corporation, a corporation, was insolvent or is now insolvent; denies that the defendant or any person or agent acting for and on behalf of said defendant had any knowledge or any reasonable cause to believe that the said Riverside Iron and Steel Corporation, a corporation, was insolvent on or about the 20th day of November, 1950 or on or about the 21st day of November, 1950, or that the said Riverside Iron and Steel Corporation, a corporation, is now insolvent. [8]

For a Further, Second and Separate Defense of Plaintiff's Complaint, Defendant Alleges:

I.

That on or about the 13th day of December, 1946, said defendant filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, styled Thomas A. Wood, plaintiff, vs.

Riverside Iron and Steel Corporation, a corporation, defendant, numbered 522523, and caused to be issued in said action a writ of attachment directed to E. T. Foley, which said writ of attachment was on said date by the Sheriff of the County of Los Angeles, State of California, served upon the said E. T. Foley attaching all moneys, credits or other properties of the Riverside Iron and Steel Corporation, a corporation, in the hands of the said E. T. Foley or in his possession or under his control; that thereafter and on or about the 16th day of December, 1946, the said E. T. Foley made return to the Sheriff of the County of Los Angeles, stating that at said time he was unable to state to what extent he had in his possession or under his control moneys, credits or properties belonging to Riverside Iron and Steel Corporation, a corporation.

II.

That thereafter and on or about the 4th day of August, 1948, the said E. T. Foley made a supplemental answer to said attachment wherein the said E. T. Foley stated that pursuant to judgment entered in an action styled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, Harlan H. Bradt et al., defendants, numbered 520858 in the Superior Court of the State of California, in and for the County of Los Angeles, that the said E. T. Foley had deposited with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, for the use and benefit of Riverside Iron and Steel Corporation,

a corporation the sum of \$82,619.69 less [9] deductions for costs plus 1000 shares of the capital stock of Riverside Iron and Steel Corporation, a corporation, standing in the name of Harlan H. Bradt.

III.

That on or about the 27th day of April, 1948, in said action styled Foley vs. Riverside Iron and Steel Corporation, Harlan H. Bradt, et al., the said E. T. Foley and the defendants Riverside Iron and Steel Corporation, a corporation and Harlan H. Bradt and their respective counsel of record entered into a stipulation which said stipulation was filed in said action and which stipulation, among other things, recited that the said E. T. Foley held said moneys in his possession subject to, among other things, writs of attachment. The writ of attachment issued out of the Superior Court of the State of California, in and for the County of Los Angeles, in case No. 522523 entitled Thomas A. Wood, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, defendant.

IV.

That thereafter and on or about the 4th day of August, 1948, said money was deposited with Harold J. Ostly, Clerk of the Superior Court of the County of Los Angeles, State of California, as ex officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, subject to the lien created by the writ of attachment

issued in said action hereinbefore referred to and styled Thomas A. Wood, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation.

V.

That on or about the 12th day of August, 1948, a writ of attachment was issued in said action, Thomas A. Wood, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, and served upon the County Clerk of the County of Los Angeles, State of California, as ex officio Clerk of the Superior Court of the [10] State of California, in and for the County of Los Angeles, attaching all of the right, title and interest of the said Riverside Iron and Steel Corporation, a corporation, in and to said sum of \$82,619.69, and the said Harold J. Ostly, County Clerk of the County of Los Angeles, State of California, as ex officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, duly and regularly made a return to the Sheriff of the County of Los Angeles, State of California, stating that the said Harold J. Ostly had in his possession property belonging to the Riverside Iron and Steel Corporation, a corporation, cash in the sum of \$82,619.69 subject to said writ of attachment.

VI.

That thereafter and after entry of judgment in said action of Wood vs. Riverside Iron and Steel Corporation, a corporation, in favor of the plaintiff, a writ of execution was duly and regularly served upon Harold J. Ostly, County Clerk of the County of Los Angeles, State of California, as ex officio Clerk of the Superior Court of the State of Cali-

fornia, in and for the County of Los Angeles, and the said Harold J. Ostly made return to the Sheriff of the County of Los Angeles, State of California, stating that he held in his possession the sum of \$82,619.69 which had been deposited with him for the account of the Riverside Iron and Steel Corporation, a corporation; that there had been served and filed with the said Harold J. Ostly, County Clerk of the County of Los Angeles, State of California, as ex officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, an assignment duly made and executed by Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt assigning all of the right, title and interest of the said Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt in and to the said sum of \$82,619.69 and in and to said [11] 1000 shares of the capital stock of the Riverside Iron and Steel Corporation, a corporation, and in and to any and all other moneys or proceeds that may come to the said Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt by reason of said judgment in said action, and that the said Harold J. Ostly, as a result of said assignment, held said sum of \$82,619.69 for the use and benefit of Le Roy B. Lorenz.

VII.

That thereafter and on or about the 29th day of November, 1950, a supplemental writ of execution was served upon the said Le Roy B. Lorenz.

VIII.

That thereafter and on or about the 1st day of December, 1950, there was issued out of the Superior Court of the State of California, in and for the County of Los Angeles, in said action E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, Harlan H. Bradt et al., defendants, an order to show cause, which said order to show cause ordered the said Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles and Le Roy B. Lorenz, the assignee of the judgment in favor of Riverside Iron and Steel Corporation, a corporation and Harlan H. Bradt, to show cause before Department 34 of the Superior Court of the State of California, in and for the County of Los Angeles, on the 8th day of December, 1950, why an order should not be made in the above-entitled action directing Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, to pay to the Sheriff of the County of Los Angeles in satisfaction of the judgment entered into in that certain action styled Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, and numbered 522523, the sum of \$4,012.98 with interest at the rate of 7% per [12] annum from the 27th day of June, 1944, plus \$18.00 costs in satisfaction of the above judgment and pursuant to the writs of attachment and executions heretofore served in said action of Wood

vs. Riverside Iron and Steel Corporation, a corporation; that said matter came on regularly for hearing before the Superior Court of the State of California, in and for the County of Los Angeles, on the 8th day of December, 1950, and that after hearing said matter an order was made in said Superior Court of the State of California, in and for the County of Los Angeles, directing the said Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, to pay over to Eugene W. Biscailuz, Sheriff of the County of Los Angeles, State of California, the sum of \$4,012.98 with interest at the rate of 7% per annum from the 27th day of June, 1944, plus \$18.00 costs in response to the writ of execution in that certain action styled Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, numbered 522523 and heretofore served on the said Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

IX.

That thereafter said order was duly and regularly served upon Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, and that said order is now a final order; that no appeal was taken therefrom and that said moneys were paid pursuant to the original lien that attached to said moneys on the 13th day of December, 1946, and the judgment subsequently entered in said action.

Wherefore, defendant prays that plaintiff take nothing by reason of his complaint; that the defendant have judgment for his costs herein expended and for all such other, further and different relief as may be just, equitable or proper in the [13] premises.

/s/ MICHAEL F. SHANNON,

/s/ THOMAS A. WOOD,

Attorneys for Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 15, 1953. [14]

STIPULATION OF FACT

[The Stipulation of Fact and Exhibits A, B, and C, filed April 22, 1954, are not printed here as they are reproduced within the Findings of Fact.

[Title of District Court and Cause.]

AMENDMENT TO STIPULATION OF FACT

It Is Stipulated by and between the attorneys for the plaintiff and the defendant in the above-entitled cause that the "Stipulation of Fact," dated April 13, 1954, shall be amended, as follows:

I.

That paragraph XI of the "Stipulation of Fact" shall be amended to read as follows, beginning after the semicolon on line 21 of page 5:

That thereafter on the 5th day of July, 1949, the County Clerk made return to said writ reporting as follows:

“That we have the sum of \$329,263.46 on deposit in the above action, which amount is to be distributed to various litigants, among whom the Riverside Iron and Steel Corporation is one, according to the Judgment entered [33] 7/30/48, upon said Judgment becoming final.”

That the sheriff returned said Writ of Execution on August 25, 1949, reporting as follows:

“I, E. W. Biscailuz, Sheriff of the County of Los Angeles, State of California, do hereby certify that I returned the annexed Writ of Execution wholly unsatisfied, with further costs of \$1.75.

“E. W. BISCAILUZ,

“By F. E. MOONEY.”

That thereafter on the 21st day of November, 1950, a second Writ of Execution was served on the County Clerk, and the County Clerk replied on December 1, 1950, as follows:

“That we have the sum of \$82,219.08 on deposit, which amount is being held subject to further order of Court.”

It is understood that this Stipulation is not intended as admission of the truth of the conclusions or statements made by the Clerk or sheriff hereinabove quoted.

II.

That a new paragraph, to be numbered paragraph XVII, shall be deemed added to the "Stipulation of Fact" at the end of paragraph XVI, as follows:

That the judgment in said action of E. T. Foley vs. Riverside Iron and Steel Corporation, et al., No. 520858, in the Superior Court of the State of California, in and for the County of Los Angeles, was signed and filed on July 28, 1948, and entered in Judgment Book 1945, page 210, on July 30, 1948. That said judgment was amended on September 24, 1948, and entered on October 6, 1948, in Judgment Book 1967, page 163. That thereafter, said Riverside Iron and Steel Corporation and Harlan H. Bradt appealed from said judgment. That said judgment [34] was affirmed by the District Court of Appeal of the State of California; that a petition for hearing in the Supreme Court was denied and a remittitur filed in the Superior Court of Los Angeles County on November 20, 1950.

Dated this 13th day of April, 1954.

LOUIS M. BROWN,

ALEX DENNY FRED,

By /s/ ALEX D. FRED,

Attorneys for Plaintiff.

/s/ THOMAS A. WOOD,

Attorney for Defendant.

[Endorsed]: Filed April 22, 1954. [35]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This case reflects the history of an 8-year effort by Wood, an attorney, to collect an attorney's fee earned by him.

A chronological chart is necessary to understand the case.

12/ 5/46—Wood sues Riverside Iron & Steel Corp., for an attorney's fee of \$4,012.90 with interest from 6/27/44.

12/ 5/46—Wood runs an attachment on Foley, who purportedly holds money belonging to Riverside.

12/16/46—Foley makes a return to the attachment or garnishment and says, in substance, that he cannot say what money is due Riverside until action No. 520858 is determined. (We will call this the Foley action.) [36]

7/28/48—Judgment is signed in the Foley case and under the judgment there is money due Riverside.

7/30/48—Judgment entered in Foley case.

7/28/48—(Dated between 7/28/48 and 8/1/48.)—A stipulation is entered into between Foley and Riverside, reciting various attachments or garnishments run against Foley attaching money due Riverside.

The Wood attachment of 12/5/46 is listed. The stipulation (1) lists these attachments, (2) recites that Foley made a return to each of them and sets up as Exhibits the copies of the returns, (3) states that the stipulation will not be an admission by Riverside that any money is due from Riverside, (4) and the stipulation contains an order, "It is so ordered, Wm. J. Palmer, Judge." [Our interpretation of the stipulation is as follows: Foley had been ordered by the judgment of 7/28/48 to pay \$329,000 into court and the judgment stated that some \$80,000 of the amount be paid to Riverside. Foley proposed to comply with the judgment but he knew, and was concerned with the garnishments run against him. He was faced with conflict between the court process of garnishment or attachment and the judgment of the court in the Foley action.

[Foley therefore secured a stipulation (it is on the legal paper of his attorneys) that the money he was depositing was subject to these attachment liens. The only reason or purpose of the judge signing the order at the end of the stipulation was, to in substance, say—[37] "Go ahead and deposit the money. We all know of the garnishments. You deposit the money subject to the liens created by the garnishments."]

- 8/ 1/48—Foley deposited the \$329,000 with the clerk in the Foley action.
- 8/ 4/48—Foley makes a supplemental return to the Wood attachment of 12/5/46 (and demand for return served on him on 12/13/46) supplementing his return of 12/16/46, and now reciting the judgment in the Foley case, his deposit of \$329,000 with the clerk and calling attention to the fact that Riverside is to get some \$80,000, under the judgment.
- 8/12/48—Wood has garnishment run on the county clerk who holds the \$329,000. (This garnishment, if valid, would run for 3 years to 8/12/51) §542(b) C.C.P.
- 9/24/48—Amended judgment signed in Foley case.
- 10/ 6/48—Amended judgment entered in Foley case. Par. 9 of the amended judgment states, “The court recognizes the possibility that one or more writs of attachment and one or more writs of execution may be served upon the Clerk, which ultimately and lawfully may require him to pay over to an enforcement officer part or all of the funds hereinabove ordered to be paid severally to one or more named distributees. It is not this court’s intention to enjoin the clerk from the performance of such duty, and should he * * * pay over * * * any portion of the fund otherwise payable hereunder to

a certain distributee * * * sums so paid over shall be deemed * * * to have been paid by the clerk to said distributee [38] and shall be charged against and deducted from the full sum otherwise payable hereunder to said distributee * * *"

[We find this judgment to be further confirmation of our view of the prior stipulation. The court in substance says that those prior attachment liens may require the clerk to pay the claims and if that happens, deduct amounts so paid from Riverside's share of the judgment.

Probably even more important, the judgment exempts the money in the hands of the clerk from the protective rule of "custodia legis."]

4/ 8/49—Wood reduces his claim to judgment.

6/27/49—Wood runs an execution on the clerk holding the \$329,000. [The lien from this execution, if valid, would expire 6/28/50, §688 C.C.P.]

7/ 5/49—Clerk makes a return and admits holding \$329,000 for various litigants.

11/20/49—The Foley case (having been appealed) remittitur comes down.

11/21/50—Wood runs a second writ of execution on the clerk.

12/ 1/50—Wood goes into Foley case and gets an order to show cause why his judgment should not be paid.

12/ 8/50—Order granted that Wood's judgment be paid.

1/ 3/51—Wood finally receives his money, \$5,800.07, which amount the plaintiff trustee herein, seeks to recover from him.

3/14/51—Riverside declared a bankrupt. [39]

This case has been tried partially on the issues of whether Wood had a lien on the money. If the decision is in the affirmative, this disposes of the case. If not, then other issues as to the insolvency of Riverside, etc., will have to be tried.

We conclude there was not a transfer, within the terms of the bankruptcy act, within four months prior to bankruptcy and that Wood received his money by virtue of a prior lien thereon.

We perceive several (and there may be more theories on which Wood is entitled to prevail.

(1) The court ordered Foley in the Foley case to deposit money on which Wood had run a garnishment. The court signed the stipulation between Foley and Riverside. In substance, the money went into court subject to Wood's claim or lien.

The garnishment had been served on Foley on 12/5/46. It ran until 12/5/49. §542(b) C.C.P. After the money passed from Foley to the clerk, Wood ran a garnishment on the clerk on 8/12/48. The new lien would not expire until 8/12/51. The running of the garnishment on the clerk was proper in view of the previous approval by the court of the stipulation and the later amended judgment, clearly

showed the intent of the court not to consider the money in "*custodio legis*."

On 4/8/49 Wood reduced his claim to judgment, and on 11/21/50, within the three-year period after the 8/12/48 garnishment, ran an execution on the clerk and eventually received his money.

The court in the Foley case recognized that the money it ordered Foley to pay to the clerk was impressed with liens and made proper provision that the liens would not be lost. [40]

The trustee's citation and quotations from 4 Am. Jur. 795-796 shows that "the officer holding it" (the money) "is the mere hand of the court * * * having no right to make any disposition of such money * * * without the consent of his own court, express or implied."

(2) It seems unthinkable that Wood's lien on the money in the hands of Foley could be destroyed by the court's order that Foley pay the money into court. Even if the court had no right to provide for the continuance of the lien, or the exemption of the money from the doctrine of *custodia legis*," then the law should spell out a suspension of the running of the three-period from the date of garnishment while the money was in "*custodia legis*." This would be based on the cases (in other situations) cited by Wood.

(3) The money was eventually paid to Wood on an order to show cause in the Foley case directed to the clerk, and Lorenz the assignee of record of

the judgment for money to Riverside. No appeal was taken from that order. It appears that the trustee is making a collateral attach on that order or judgment.

Judgment shall be in favor of Wood. Wood to prepare, serve and file findings, conclusions of law and judgment, pursuant to the rules of the court.

Dated: June 30, 1954.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed June 30, 1954. [41]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL, OR IN THE AL-
TERNATIVE, TO ALTER OR AMEND
THE JUDGMENT HEREIN AND POINTS
AND AUTHORITIES

Plaintiff herein respectfully moves the Court as follows:

(1) To grant a new trial herein, or in the alternative,

(2) To alter or amend the judgment entered herein on March 30, 1955.

The grounds for said motion are as follows:

1. Errors in law occurring at the trial, including among other things, the following errors:

(a) In holding and finding that the defendant did not receive a transfer of funds within four months prior to bankruptcy.

(b) In holding and finding that the funds referred to in Paragraph III of the Court's findings of fact were not held custodia legis.

(c) In holding and finding that the defendant received [42] any moneys pursuant to any garnishment or writ of execution issued or served prior to November 21, 1950.

(d) In holding and finding by implication that the writ of attachment referred to in Paragraph I of the conclusions of law remained a valid writ of attachment after three years from December 5, 1946.

(e) In holding and finding that the instant action constitutes a "collateral" attack upon the order directing the County Clerk to pay \$5,478.24 to the Sheriff of Los Angeles County, as set forth in Paragraph V of the conclusions of law.

(f) In holding and finding that the writ of attachment referred to in Paragraph VI of the conclusions of law was valid.

(g) In holding and finding that the writ of execution issued April 8, 1949, referred to in Paragraphs VII and VIII of the conclusions of law, was a valid writ.

(h) In holding and finding that the deposit in custodia legis, referred to in Paragraph IV of the

conclusions of law herein, "would have suspended the running of the period of limitations for which attachments then outstanding against said fund had yet to run."

(i) In holding and finding that the plaintiff is not entitle to recover anything by reason of his complaint.

2. Insufficiency of the evidence to justify the decision and judgment of the Court. In this connection, plaintiff states as follows:

(a) Plaintiff incorporates herein by reference Subparagraphs (a) through (i) inclusive of Paragraph 1 hereinabove.

(b) There is insufficient evidence to support the Court's finding that the Superior Court of the County of Los Angeles, either expressly or impliedly, provided that the moneys deposited to order of court in the case of *E. T. Foley v. Riverside [43] Iron & Steel Corp.*, were not to be held in custodia legis.

(c) There is insufficient evidence to support the finding that the above referred to deposit was made "subject to the liens of any attachments or executions then outstanding against said fund in the hands of *E. T. Foley*."

3. Newly discovered evidence material to the plaintiff herein which he could not with reasonable diligence have discovered and produced at the time of the trial.

The foregoing motion is made and based upon this notice, upon the affidavit of Alex D. Fred served herewith, and upon all the pleadings and papers on file herein.

Dated: April 11, 1955.

ALEX D. FRED, and
LOUIS M. BROWN,

By /s/ ALEX D. FRED,
Attorneys for Plaintiff. [44]

POINTS AND AUTHORITIES

I.

Incorporation Herein By Reference of Earlier Briefs

This matter was comprehensively briefed by counsel for both sides prior to the decision and judgment of this Court. The points discussed in the previously filed written briefs are material and pertinent on this motion for new trial. For this reason, the plaintiff will not again set forth all of the points and authorities upon which he relies in support of this motion. Rather, plaintiff respectfully requests that the Court refer to the written briefs already on file, and plaintiff incorporates the same herein by reference as though set forth at length.

II.

The Evidence Does Not Support the Finding That
the Funds Held By the Clerk Were Not In
Custodia Legis

The Court in rendering judgment in behalf of the defendant in the instant matter, predicated its decision, in part, at least, on the theory that the moneys deposited by Foley, pursuant to order of Court in *Foley v. Riverside Iron and Steel Corp.*, were not in custodia legis until the termination of the appeal. Plaintiff submits that this finding is erroneous and not supported by the evidence, for the reasons stated in the earlier briefs of the plaintiff.

However, assuming, arguendo, such finding is correct, there is then no basis for the Court's failure to find that the writs of attachment and execution issued prior to November 21, 1950, had not run their statutory length and expired according to law.

Jones v. Toland,
117 Cal. App. 481, 483.

Puissegur v. Yarborough,
29 Cal. 2d 409. [45]

III.

Plaintiff Is Not Collaterally Attacking the Superior Court Order Directing Payment To Defendant

One point not discussed in the earlier briefs, which should be mentioned herein, relates to the memorandum decision of this Court, implying that the plaintiff is now seeking to collaterally attack the December 8, 1950, Order of the Superior Court directing that the Clerk turn over sufficient funds to satisfy the Wood judgment to the Sheriff. Rather

than attacking the order, the plaintiff seeks to rely upon it. The facts show that the Sheriff received the money pursuant to the writ of execution issued on November 20, 1950. (The earlier writs had been returned unsatisfied.) Plaintiff does not contend that the Court's order was erroneous. In fact, the December 8, 1950, order, and the Sheriff's return thereon, show that Wood received the money pursuant to a writ of execution which was issued within the period of four months prior to the bankruptcy of the Riverside Iron and Steel Corporation. The question of the preference could not have been litigated in the Superior Court at the time the December 8, 1950, directing payment to Wood was made for the reason that Riverside was not then in bankruptcy.

The plaintiff submits that this Court in finding that the moneys were paid pursuant to the earlier writs, has failed to give proper weight to the December 8th order and the Sheriff's return pursuant thereto. (See Stipulation of Facts, Paragraphs XIII and XIV.) These conclusively show that the moneys were received pursuant to a writ issued, served and returned all within the four-month period prior to Riverside's bankruptcy.

Respectfully submitted,

ALEX D. FRED, and
LOUIS M. BROWN,

By /s/ ALEX D. FRED. [46]

[Title of District Court and Cause.]

AFFIDAVIT OF ALEX D. FRED

State of California,
County of Los Angeles—ss.

Alex D. Fred, being first duly sworn, deposes and says:

1. That he is one of the attorneys for the plaintiff herein and is familiar with and has knowledge of the facts of the instant case.

2. That he is the attorney who executed on behalf of the plaintiff, the Stipulation of Facts, which served as the basis of the Court's decision and judgment herein. That Paragraph VIII of said stipulation refers to a stipulation incorporated therein and hereinafter referred to as Exhibit "B," pertaining to certain writs of attachment, including one which the defendant herein caused to be issued. Said Paragraph VIII further provides [47] and said Exhibit "B" reflects that the stipulation was signed by William J. Palmer, Judge of the Superior Court of Los Angeles County, under the notation "It Is So Ordered." That said stipulation of facts was prepared by the attorney for defendant herein.

3. That after the filing of the memorandum decision herein by this Court, affiant was informed by counsel active in the trial and appeal of *Foley v. Riverside Iron and Steel Corporation*, that they could not recall that said Judge Palmer, or any other judge, had signed such stipulation.

4. That affiant thereafter examined the records and files of said action of *Foley v. Riverside Iron and Steel Corporation*, in the possession of the Clerk of the Superior Court of Los Angeles County, and said records and files do not reveal any stipulation signed by said judge or any other judge. Said records reveal that the original of the stipulation, referred to as Exhibit "B" in the statement of facts agreed upon by the parties hereto, was filed on or about April 27, 1948, but that the signature of the judge is not affixed thereto either under the clause "It Is So Ordered," or elsewhere in said stipulation.

5. That further after the filing of said memorandum decision, affiant discovered that the reporter's transcript of the proceedings on April 27, 1948, in the trial court, in the aforesaid case of *Foley v. Riverside Iron and Steel Corporation*, contained the following colloquy relating to the stipulation referred to as Exhibit "B," commencing on line 3, at page 3063, and continuing to line 13, page 3064:

"Mr. Darling: I find that Mr. Cosgrove has prepared a stipulation which refers to the cases about which I was about to address myself, and I think if Mr. Cosgrove will explain to the Court the purpose, because I merely wanted to get in the record in this case the pendency of those four actions, I believe. [48]

"The Court: Has the stipulation been signed?

“Mr. Hammack: By all parties.

“Mr. Cosgrove: We have been served with garnishments, attachments in each of the cases, and we wish to have the record show that money that was due Mr. Bradt was under garnishment, and we prepared a stipulation not knowing that Mr. West and Mr. Long were interested in it, and discussed it with Mr. Hammack and wrote up a stipulation in which we recited the title of the case, the cause and the amount claimed, and that we were served with a garnishment, and we have all signed the stipulation and would like to submit it for the signature of the Court, and then the record will disclose that those garnishments on those cases have been served.

“(Passing document to the Court.)

“The Court: I notice at the bottom of this stipulation there is a place for the Court to sign so as to make it unanimous, and it says ‘It is so ordered.’ But what is it I am ordering?

“Mr. Cosgrove: It is not necessary to sign it, your Honor. My secretary is in the habit of putting those things on there.

“The Court: There is really no occasion for me to sign it.

“Mr. Cosgrove: I would say not, your Honor.

“Mr. Darling: You will also note, your Honor, that the name of my firm was not typed on the stipulation.

“The Court: Well, I think you have a right to feel slighted, Mr. Darling.

“Mr. Darling: I told Mr. Cosgrove I considered it a personal affront.”

6. Based on the foregoing, affiant states that that portion of Paragraph VIII stating that said Exhibit “B” was signed by “William J. Palmer, Judge of the Superior Court,” is erroneous, and that in fact said Exhibit “B” was not signed by said judge or any other judge. [49]

7. Affiant further states that affiant, on behalf of the plaintiff, and counsel for the defendant herein stipulated that said Exhibit “B” was signed by the aforesaid judge under an inadvertent mistake of fact occasioned by the confusion resulting from the fact that said Exhibit “B” provided a place for the signature of said judge after the words “It is so ordered.” That affiant had no knowledge that the said Exhibit “B” was not signed by the aforesaid judge until some time after this Court rendered its memorandum decision herein.

Dated this 11th day of April, 1955.

/s/ ALEX D. FRED.

Subscribed and sworn to before me this 11th day of April, 1955.

[Seal] /s/ ROBERT S. DUKERMAN,
Notary Public in and for said
County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1955. [50]

[Title of District Court and Cause.]

MINUTES OF THE COURT

DEC. 19, 1955

Present: Hon. James M. Carter, District Judge.

Proceedings:

For hearing motion of plaintiff, filed April 11, 1955, for a new trial, or, in the alternative, to alter or amend the judgment.

Attorney Fred argues in support of the motion, and Attorney Wood argues in opposition.

It Is Ordered that motion for new trial is denied, and that the alternative motion to amend judgment is denied.

On the Court's own motion, It Is Ordered that findings of fact and conclusions of law and judgment are vacated, and that findings be amended, and that new findings of fact, conclusions of law, and judgment be presented by Jan. 20, 1956.

JOHN A. CHILDRESS,
Clerk;

By L. B. FIGG,
Deputy Clerk. [52]

In the United States District Court, Southern
District of California, Central Division

No. 15259-C

LEWIS H. SAPER, as Trustee, etc.,
Plaintiff,

vs.

THOMAS A. WOOD,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 13th day of April, 1954, before the above-entitled court, the Honorable James M. Carter, Judge presiding, Louis M. Brown and Alexander Denny Fred, appearing as attorneys for the plaintiff, Lewis H. Saper, Trustee in Bankruptcy of the Estates of Riverside Iron and Steel Corporation, and Harlan H. Brandt. Thomas A. Wood, appeared in pro persona for the defendant Thomas A. Wood.

The attorneys for the plaintiff and the defendant submitted said cause upon agreed statement of fact.

(1.)

That said stipulation of fact was in words and figures as follows:

“It Is Stipulated by and between the attorneys for the plaintiff and the defendant in the above-entitled cause as follows: [53]

“I.

“That Thomas A. Wood, on December 5, 1946, filed an action against the Riverside Iron and Steel Corporation for attorney’s fees in the sum of \$4,012.90 together with interest thereon at the rate of 7% per annum from the 27th day of June, 1944.

“II.

“That in said action and on December 5, 1946, a writ of attachment issued out of the Superior Court of the State of California, in and for the County of Los Angeles, directed to E. T. Foley and that said writ of attachment was, by the Sheriff of Los Angeles County, on December 5, 1946 served upon the said E. T. Foley.

“III.

“That on the 16th day of December, 1946, the said E. T. Foley made return on said attachment as follows: ‘That I am at this time unable to state whether or to what extent I have in my possession or under my control any credits or other personal property belonging to the above-named defendant, or whether or to what extent I am indebted to said defendant for the reasons more particularly stated in the complaint, as amended, and other pleadings in that certain action now pending in the above-entitled court entitled E. T. Foley, defendant, vs. Riverside Iron and Steel Corporation, et al., defendants, No. 520859, to which reference is hereby made for further particulars, and that I cannot so state until said action is finally determined.’

“IV.

“That on January 20, 1947, the Riverside Iron and Steel Company filed its answer to the complaint on file in the Superior Court of the State of California, in and for the County of Los Angeles; that on February 10, 1948, the [54] defendant Thomas A. Wood in said action made a motion for a summary judgment, which motion was denied.

“V.

“That on February 26, 1948, a motion was made to set said action for trial.

“VI.

“That said action was set for trial in the Superior Court of the State of California, in and for the County of Los Angeles for January 3, 1949.

“VII.

“That on August 4, 1948, the said E. T. Foley made a supplemental answer to the writ of attachment theretofore served upon him by the Sheriff of Los Angeles County; that a copy of said answer as so made is attached to this stipulation and marked Exhibit ‘A’: [that on August 12, 1948, attachment was made upon the County Clerk of the County of Los Angeles, State of California].

“VIII.

“That on August 1, 1948, and after the signing of the findings and judgment in the action entitled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, the said E. T. Foley deposited with the Clerk of the Superior Court of the State of California, in and for the County of Los

Angeles, the sum of \$329,263.46; that prior to depositing said money with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, the said E. T. Foley, as plaintiff in said action, Riverside Iron and Steel Corporation, Harlan H. Bradt and defendants West and Long entered into a stipulation, which stipulation was signed individually by E. T. Foley, individually by Harlan H. Bradt, Riverside Iron and Steel Corporation by Harlan H. Bradt, by Hewitt S. [55] West, and it was also signed by Cosgrove, Clayton, Cramer & Diether by T. B. Cosgrove, attorneys for E. T. Foley, and by Hammack & Hammack, Kenneth McEwen by Dan S. Hammack, Jr., attorneys for Riverside Iron and Steel Corporation, by Guthrie, Darling & Shattuck by Hugh W. Darling, attorneys for West and Long, and was signed by William J. Palmer, Judge of the Superior Court, a copy of said stipulation being attached hereto and marked Exhibit 'B.'

“IX.

“That thereafter and in said action, E. T. Foley, vs. Riverside Iron and Steel Corporation, a corporation, findings and an amended judgment were entered. Paragraph 9 of the amended judgment provides:

“9. That the plaintiff, E. T. Foley, within ten days after the date of entry of this judgment, shall deposit with the Clerk of this Superior Court, the sum of \$329,263.46 for disbursement as herein provided.

“That upon the date when this judgment shall have become final in the Court in which this proceeding shall be finally decided, the Clerk of this Superior Court, forthwith and without further order of this Court, shall distribute and pay said sum of \$329,263.46 to the parties to this action now to be named, and in the several amounts as follows:

“To A. S. Vinnell and C. W. Dun-
ton, the sum of\$84,919.74
“To W. L. Long, the sum of\$81,898.48
“To H. S. West, the sum of\$76,898.48
“To E. T. Foley, the sum of\$ 2,927.07
“To Riverside Iron and Steel Cor-
poration and Harlan H. Bradt, the
sum of\$82,619.69

“less deductions for costs as hereinafter provided. [56]

“That execution shall not issue from the whole or any portion of this Judgment unless the plaintiff should fail to pay to the Clerk the funds herein required of him to be paid, or unless the Clerk should fail to disburse said funds as herein required.

“The court recognizes the possibility that one or more writs of attachment and one or more writs of execution may be served upon the Clerk, which ultimately and lawfully may require him to pay over to an enforcement officer part or all of the funds hereinabove ordered to be paid severally to one or more named distributees. It is not this Court's intention to enjoin the Clerk from the performance

of any such duty, and should he, in performance of such a duty, pay over to an enforcement officer any portion of the fund otherwise payable hereunder to a certain distributee, any and all sums so paid over shall be deemed, for the purposes of the distribution herein ordered, to have been paid by the Clerk to said distributee and shall be charged against and deducted from the full sum otherwise payable hereunder to said distributee. This Court does not pretend to determine the validity of any claim or judgment upon which any writ of execution or attachment may issue.'

"X.

"That on January 13, 1949, the case of Wood vs. Riverside Iron and Steel Corporation, was continued to March 14, 1949, for trial.

"XI.

"That said action was tried and contested, and on April 8, [57] 1949, judgment was entered in said action in favor of the said Thomas A. Wood against Riverside Iron and Steel Corporation as prayed for in the complaint in said action; that thereafter and on the 28th day of June, 1949, a writ of execution was issued out of the Superior Court of the State of California, directed to the Sheriff and to be served upon the County Clerk.

"XII.

"That on the 1st day of December, 1950, there was issued out of the Superior Court of the State of California an order to show cause directed to the

County Clerk of the County of Los Angeles and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, and to LeRoy B. Lorenz, in Department 34 of the Superior Court of the State of California, in and for the County of Los Angeles on the 8th day of December, 1950, at 9:30 o'clock of that day why an order should not be made in the above-entitled action, being the action of E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, No. 520858, directing Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, to pay to the Sheriff of Los Angeles County in satisfaction of the judgment entered in that certain action styled Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, and numbered 522523, out of the funds now on deposit with said Clerk in the above-entitled action for the use and benefit of the Riverside Iron and Steel Corporation and Harlan H. Bradt the sum of \$4,012.98 with interest at the rate of 7% per annum from the 27th day of June, 1944, plus \$18.00 costs in satisfaction of the above judgment and pursuant to the writs of attachment and executions heretofore issued and served in said action of Wood vs. Riverside [58] Iron and Steel Corporation. A copy of said order to show cause is attached hereto and marked Exhibit 'C.'

“XIII.

“That said order to show cause came on in Department 34 of the Superior Court of the State of

California, in and for the County of Los Angeles, on the 8th day of December, 1950; that the Superior Court made its order:

“ ‘The above-entitled matter coming on for hearing on the 8th day of December, 1950, pursuant to order to show cause issued on the 1st day of December, 1950. Thomas A. Wood appearing for the moving party and Harold W. Kennedy, County Counsel, by John B. Anson, Deputy Counsel, appearing for Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, LeRoy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt having been served with said order to show cause on the 1st day of December, 1950, and having defaulted, and the default of the said LeRoy B. Lorenz having been entered, the matter having been submitted to the court for decision on the affidavits and oral argument,

“ ‘Now, Therefore, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, is hereby ordered to pay over to Eugene W. Biscailuz, Sheriff of the County of Los Angeles, State of California, the sum of \$4,012.98, with interest at the rate of 7 per cent per annum from the 27th day of June, 1944, plus \$18.00 costs, in response to the writ of execution issued in that certain [59] action styled Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, numbered

522523 and heretofore served on the said Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by said Sheriff, and to pay said money out of the funds heretofore deposited in the above-entitled action by the plaintiff, E. T. Foley, pursuant to order of court, for the use and benefit of Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt.'

"XIV.

"That pursuant to said order, the County Clerk delivered to Eugene W. Biscailuz, Sheriff of the County of Los Angeles, in satisfaction of the judgment in Wood vs. Riverside Iron and Steel Corporation, the sum of \$5,838.49; that the Sheriff deducted from said sum the sum of \$37.69 for his fees and expenses, and on January 3, 1951, remitted to the said Thomas A. Wood the sum of \$5,800.07 in partial satisfaction of said judgment: that the Sheriff thereafter filed his Sheriff's Collection Return in the case of Wood vs. Riverside Iron and Steel Corporation, as follows:

"'I hereby certify that under and by virtue of the within hereunto annexed writ by me received on the 20th day of November, 1950, I did, on the 21st day of December, 1950, collect from Harold J. Ostly, County Clerk of Los Angeles County (remitted to Sheriff in Superior Court Case 520-858—Foley v. Riverside Iron and Steel Cpn.—with Court Order directing application in Case 522-523) the sum of \$5,848.49, and I deducted from the said sum of

\$5,838.49 my fees, commissions and expenses in the sum of \$37.69, leaving a net balance of [60] \$5,800.07 which has been paid to the attorney for creditor by County Warrant, in partial satisfaction.'

"XV.

"That on the 14th day of March, 1951, the Riverside Iron and Steel Corporation filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York and thereafter was adjudicated a bankrupt.

"XVI.

"On July 6, 1949, and after Harold J. Ostly, County Clerk, had made his return, the Sheriff of Los Angeles County made demand upon the said Harold J. Ostly for the payment owing to said Sheriff out of the moneys then on deposit with said County Clerk to the credit of Riverside Iron and Steel Corporation, a corporation, demanding the sum of \$5,478.24; that the Sheriff of Los Angeles County, on November 21, 1950, after return having been made by Harold J. Ostly, County Clerk, again made demand upon the said Harold J. Ostly to pay over to the Sheriff out of funds in the possession of the said Harold J. Ostly, as County Clerk, belonging to the Riverside Iron and Steel Corporation, a corporation, in the sum of \$5,478.24."

(2)

That said stipulation of fact was amended as follows:

"It Is Stipulated by and between the attorneys for the plaintiff and the defendant in the above-en-

titled cause that the 'Stipulation of Fact,' dated April 13, 1954, shall be amended, as follows:

"I.

"That paragraph XI of the 'Stipulation of Fact' shall be amended to read as follows, beginning after the semicolon on line 21 of page 5:

"That thereafter on the 5th day of July, 1949, the [61] County Clerk made return to said writ reporting as follows:

"'That we have the sum of \$329,263.46 on deposit in the above action, which amount is to be distributed to various litigants, among whom the Riverside Iron and Steel Corporation is one, according to the Judgment entered 7-30-48, upon said Judgment becoming final.'

"That the Sheriff returned said Writ of Execution on August 25, 1949, reporting as follows:

"'I, E. W. Biscailuz, Sheriff of the County of Los Angeles, State of California, do hereby certify that I returned the annexed Writ of Execution wholly unsatisfied, with further costs of \$1.75.

"'E. W. BISCAILUZ,
"By F. E. MOONEY.'

"That thereafter on the 21st day of November, 1950, a second Writ of Execution was served on the County Clerk, and the County Clerk replied on December 1, 1950, as follows:

"'That we have the sum of \$82,219.08 on deposit, which amount is being held subject to further order of court.'

“It is understood that this Stipulation is not intended as admission of the truth of the conclusions or statements made by the Clerk or Sheriff hereinabove quoted.

“II.

“That a new paragraph, to be numbered paragraph XVII, shall be deemed added to the ‘Stipulation of Fact’ at the end of paragraph XVI, as follows:

“That the judgment in said action of E. T. Foley vs. Riverside Iron and Steel Corporation, et al., No. 520858, in the Superior Court of the State of California, in and for the [62] County of Los Angeles, was signed and filed on July 28, 1948, and entered in Judgment Book 1945, page 210 on July 30, 1948. That said Judgment was amended on September 24, 1948, and entered on October 6, 1948, in Judgment Book 1967, page 163. That thereafter, said Riverside Iron and Steel Corporation and Harlan H. Bradt appealed from said judgment. That said judgment was affirmed by the District Court of Appeal of the State of California; that a petition for hearing in the Supreme Court was denied and a remittitur filed in the Superior Court of Los Angeles County on November 20, 1950.

“Matters Reserved for Future Determination

“The question of whether or not Riverside Iron and Steel Corporation was insolvent on the date it filed its voluntary petition in bankruptcy, in the event that it is necessary, will be submitted to the Court on oral testimony.

“The question of whether or not the defendant or his agents acting with reference thereto had knowledge or reasonable cause to believe that said Riverside Iron and Steel Corporation was insolvent will likewise be submitted on oral testimony, in the event that it is necessary for the court to make a decision.

“Dated this 13th day of April, 1954.

“THOMAS A. WOOD,

“Attorney for Defendant.

“LOUIS M. BROWN,

“ALEX DENNY FRED,

“By ALEX D. FRED,

“Attorneys for Plaintiff.” [63]

EXHIBIT “A”

In the Superior Court of the State of California,
in and for the County of Los Angeles
No. 522523

THOMAS A. WOOD,

Plaintiff,

vs.

THE RIVERSIDE IRON & STEEL CORPORATION,
a Corporation,

Defendant.

SUPPLEMENTAL ANSWER TO
GARNISHMENT

To notice of garnishment and attachment and demand for a statement served on me, on December

13, 1946, by the Sheriff of Los Angeles County, under and by virtue of a writ of attachment issued in the above-entitled action, and supplementing my answer of December 16, 1946, please be advised that in that certain action in the above-entitled court, entitled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, et al., defendants, No. 520858, judgment was duly and regularly entered on Friday, July 30, 1948, in Book 1945, page 210 of Judgments. That under the terms of said judgment, E. T. Foley, the plaintiff in said action, was directed, within ten days after the entry thereof, to deposit with the Clerk of this Court the sum of \$329,263.46 for disbursement as in the judgment provided, and also to deposit with said Clerk certificates of the capital stock of Riverside Iron and Steel Corporation in the amount of 1,000 shares, with executed assignments releasing all right, title and interest of E. T. Foley in such stock to Harlan H. Bradt or his nominee. That of said sum of \$329,263.46, the judgment declares that Riverside Iron and Steel Corporation and Harlan H. Bradt are entitled to the [64] sum of \$82,619.69, less deductions for costs, and directs the Clerk of the Court, when said judgment shall have become final in the Court in which said cause shall be finally decided, to distribute and pay to Riverside Iron and Steel Corporation and Harlan H. Bradt the sum of \$82,619.69, less deductions for costs, and said 1,000 shares of stock and executed assignments thereof. That said E. T. Foley, in compliance with said judgment, deposited with the Clerk of said Court said sum of \$329,263.46 and said 1,000 shares of the capital stock of Riverside Iron

and Steel Corporation, with executed assignments releasing all his right, title and interest therein to Harlan H. Bradt.

That said judgment directs said Clerk to distribute the remainder of said sum of \$329,263.46 in the several amounts therein specified to several parties therein named, other than said Harlan H. Bradt.

August 4, 1948.

E. T. FOLEY, by
COSGROVE, CLAYTON,
CRAMER & DIETHER,

By T. B. COSGROVE,
His Attorneys. [65]

EXHIBIT "B"

In the Superior Court of the State of California,
in and for the County of Los Angeles
No. 520858

E. T. FOLEY,

Plaintiff,

vs.

RIVERSIDE IRON AND STEEL CORPORATION,
HARLAN H. BRADT, et al.,

Defendants.

STIPULATION

It Is Stipulated by and between plaintiff, E. T. Foley, and defendants, Riverside Iron and Steel

Corporation and Harlan H. Bradt, and their respective counsel of record, as follows:

1. Subsequent to the filing of the complaint herein there were duly served upon plaintiff, E. T. Foley, by the Sheriff of Los Angeles County, California, four (4) certain writs of attachments, attaching all moneys, goods, credits, effects, debts, due or owing, or any personal property in plaintiff's possession or under plaintiff's control, belonging to defendants, Riverside Iron and Steel Corporation and/or Harlan H. Bradt, as follows:

(a) Los Angeles Superior Court case No. 524582, entitled "United States Pipe and Foundry Company, plaintiff, v. Harlan H. Bradt, defendant," in the sum of Ten Thousand One Hundred Forty-eight and 25/100 Dollars (\$10,148.25), besides interest at the rate of 7% per annum from the 21st day of December, 1946, and costs of suit. A true and correct copy of said [66] writ is attached hereto, marked Exhibit A, and by this reference made a part hereof;

(b) Los Angeles Superior Court case No. 522523, entitled "Thomas A. Wood, plaintiff, v. The Riverside Iron & Steel Corporation, a corporation, defendant," in the amount of Four Thousand Twelve and 90/100 Dollars (\$4,012.90), besides interest at the rate of 7% per annum, from the 27th day of June, 1944, and costs of suit. A true and correct copy of said writ is attached hereto, marked

Exhibit B, and by this reference made a part hereof;

(c) Los Angeles Municipal Court case No. 819365, entitled "Mary I. Fraser, Executrix of the Estate of James S. Fraser, plaintiff, v. Riverside Iron & Steel Corporation, (a corporation), and Harlan H. Bradt, defendant," in the amount of Two Thousand Dollars (\$2,000.00), with interest at 4% per annum from June 29, 1941, and costs of suit. A true and correct copy of said writ is attached hereto, marked Exhibit C, and by this reference made a part hereof;

(d) Los Angeles Superior Court case No. 532598, entitled "E. L. Brumley, plaintiff, v. Harlan H. Bradt, defendant," in the amount of Twenty-five Hundred Dollars (\$2,500.00), with interest at the rate of 6% per annum from January 2, 1941, and costs of suit. A true and correct copy of said writ is attached hereto, marked Exhibit D, and by this reference made a part hereof.

2. To each of said writs so served, plaintiff E. T. Foley, [67] delivered to the Sheriff of Los Angeles County, California, as required by law, a statement in writing. True copies of said statements are attached hereto, marked Exhibits E-1, to E-4, inclusive, and by this reference made a part hereof.

3. Nothing herein contained shall be construed to be an admission by defendants, Riverside Iron and Steel Corporation or Harlan H. Bradt, that

there is due or owing anything to anyone under the cases or attachments above referred to.

/s/ E. T. FOLEY.

/s/ HARLAN H. BRADT.

RIVERSIDE IRON AND
STEEL CORPORATION,

By HARLAN H. BRADT.

COSGROVE, CLAYTON,
CRAMER & DIETHER,

T. B. COSGROVE,
SAMUEL H. RINDGE,

By /s/ T. B. COSGROVE,
Attorneys for E. T. Foley.

HAMMACK & HAMMACK,
KENNETH McEWEN,

By DAN S. HAMMACK, JR.,
Attorneys for Riverside Iron and Steel Corporation
and Harlan H. Bradt.

GUTHRIE, DARLING &
SHATTUCK, By

HUGH W. DARLING,
Attorneys for West & Long,
Hewitt S. West.

It Is So Ordered:

.....,
Judge. [68]

EXHIBIT "C"

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 520858

E. T. FOLEY,

Plaintiff,

vs.

RIVERSIDE IRON AND STEEL CORPORATION,
a Corporation, HARLAN H. BRADT,
et al.,

Defendants.

ORDER TO SHOW CAUSE

Upon the reading and filing of the affidavit of
Thomas A. Wood, and good cause appearing there-
for,

It is Ordered that Harold J. Ostly, County Clerk
and Clerk of the Superior Court of the State of
California, in and for the County of Los Angeles,
and LeRoy B. Lorenz, the assignee of the judgment
in favor of Riverside Iron and Steel Corporation,
and Harlan H. Bradt, in the above-entitled cause,
show cause before me in Department 34 of the
Superior Court of the State of California, in and
for the County of Los Angeles, on the 8th day of
December, 1950, at 9:30 o'clock a.m. of that day,
or as soon thereafter as counsel can be heard, why
an order should not be made in the above-entitled
action directing Harold J. Ostly, County Clerk and

Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, to pay to the Sheriff of the County [69] of Los Angeles, in satisfaction of the judgment entered in that certain action styled “Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, and numbered 522523, out of funds now on deposit with said Clerk in the above-entitled Action, for the use and benefit of Riverside Iron and Steel Corporation and Harlan H. Bradt, the sum of \$4,012.98, with interest at the rate of 7% per annum from the 27th day of June, 1944, plus \$18.00 costs, in satisfaction of the above judgment and pursuant to the writs of attachment and executions heretofore issued and served in said action of Wood vs. Riverside Iron and Steel Corporation, a corporation.

“It is further Ordered that a copy of the affidavit of Thomas A. Wood and a copy of this order be served upon Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, and LeRoy B. Lorenz, at least five (5) days before the time fixed herein for showing cause.

“Dated this 1st day of December, 1950.

“W. TURNEY FOX,
“Judge of the Superior
“Court.”

(3)

The court finds that there was not a transfer of funds within the meaning of the terms of the Bankruptcy Act within four months prior to bankruptcy.

(4)

The Court finds that it is true that the Superior Court of the State of California, in and for the County of Los Angeles, in the case of *E. T. Foley vs. Riverside Iron and Steel Corporation and Harlan H. Bradt*, ordered paid into court the sum of \$329,000.00; that said court specifically provided, however, that said fund was [70] not to be held in custodia legis and that the Clerk was to pay out said fund to the persons entitled thereto upon final judgment in the action.

(5)

That it is true that on April 8, 1949, judgment was entered in favor of Thomas A. Wood against Riverside Iron and Steel Corporation as prayed for in the complaint in said action; that it is true that thereafter and on the 28th day of June, 1949, a writ of execution issued out of the Superior Court of the State of California, directed to the Sheriff, to be served upon the County Clerk; that it is true that at the time of the issuance of said writ on the 28th day of June, 1949, the judgment in *Foley vs. Riverside Iron and Steel Corporation and Bradt* had not yet become final and that therefore said judgment and said fund in the hands of the Clerk was not subject to a writ of execution under Section 688 of the Code of Civil Procedure of the State of California, and no effort was made to impress a lien upon said judgment or said fund pursuant to Section 688.1 of the Code of Civil Procedure of the State of California.

(6)

That the Superior Court of the State of California, in and for the County of Los Angeles, properly ordered the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, to pay over to Thomas A. Wood the sum of \$5,800.07 and that said money was not received by the defendant Thomas A. Wood by reason of any attachment or lien which the said Thomas A. Wood acquired within four months prior to bankruptcy of Riverside Iron and Steel Corporation; that said money was received by the said Thomas A. Wood pursuant to garnishment served on E. T. Foley on December 5, 1946, and pursuant to garnishment served upon the Clerk of the Superior Court of the State of California on the 12th day of August, 1948, and pursuant to writ of execution served upon [71] the Clerk of the Superior Court of the State of California on the 21st day of November, 1950.

Conclusions of Law

From the foregoing findings of fact, the court makes its conclusions of law as follows:

I.

That the defendant Thomas A. Wood, on the 5th day of December, 1946, served on E. T. Foley a valid writ of attachment.

II.

That the said E. T. Foley, pursuant to stipulation and order of court, deposited the moneys with the

County Clerk of the Superior Court of the State of California, subject to the lien of the writ of attachment issued on the 5th day of December, 1946.

III.

That the defendant Thomas A. Wood, on the 12th day of August, 1948, caused to be served on the Clerk of the Superior Court of the State of California a valid writ of attachment.

IV.

That under the law of the State of California, the judgment and the funds in the possession of the Clerk, pursuant to order of court, were not subject to execution and levy under writ of execution until the judgment became final; that the writ of execution issued on the 28th day of June, 1949, did not create a lien upon either the judgment or the funds in the hands of the Clerk of the Superior Court of the State of California.

V.

That a lien was created on said funds in the hands of E. T. Foley by virtue of the writ of attachment served on the 5th day of December, 1946, and said fund was transferred to and deposited with the Clerk of the Superior Court of the State of [72] California, subject to said lien.

VI.

That the writ of attachment issued on the 12th day of August, 1948, and served upon the Clerk of the Superior Court of the State of California created a valid lien on said fund subject to the final determination in the action.

VII.

That the present action by Lewis H. Saper, as trustee, against defendant Thomas A. Wood is a collateral attack upon a final order made by the Superior Court of the State of California, in and for the County of Los Angeles, in the case of Foley vs. Riverside Iron and Steel Corporation directing the County Clerk to pay the sum of \$5,478.20 to the Sheriff of the County of Los Angeles in satisfaction of the writ of execution issued on November 21, 1950.

VIII.

That the funds as deposited, pursuant to order of court, with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, were not placed in custodia legis by virtue of the order of the Superior Court of the State of California, in and for the County of Los Angeles.

IX.

That the defendant Thomas A. Wood is entitled to a judgment in his favor.

X.

That the complaint be dismissed.

Dated this 23rd day of January, 1956.

/s/ JAMES M. CARTER,
Judge.

Findings Reimbursed by Courts

/s/ J. M. C.

Lodged January 16, 1956.

[Endorsed]: Filed January 23, 1956. [73]

In the United States District Court, Southern District of California, Central Division

No. 15259—C

LEWIS H. SAPER, as Trustee, etc.,

Plaintiff,

vs.

THOMAS A. WOOD,

Defendant.

JUDGMENT

The above-entitled cause came on for trial and hearing before the Honorable James M. Carter judge presiding, without a jury, the plaintiff being represented by Louis M. Brown and Alexander Denny Fred and the defendant appearing in pro persona. The cause being submitted upon a written statement of fact, the court having considered said written statment of fact and thereafter having made its findings of fact and conclusions of law pursuant thereto, enters judgment as follows:

It is Hereby Ordered, Adjudged and Decreed:

1. That the plaintiff take nothing by reason of his complaint;
2. That said complaint be dismissed;
3. That the defendant have and recover his costs herein expended in the sum of \$.

Dated this 23rd day of January, 1956.

/s/ JAMES M. CARTER,
Judge.

Affidavit of Service by Mail attached.

Lodged January 16, 1956.

[Endorsed]: Filed January 23, 1956.

Docketed and entered January 24, 1956. [75]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Lewis H. Saper, as Trustee in Bankruptcy of Riverside Iron & Steel Corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on January 24, 1956.

Dated: February 17, 1956.

ALEX D. FRED and
LOUIS M. BROWN.

By /s/ ALEX D. FRED,
Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed February 23, 1956. [77]

[Title of District Court and Cause.]

STATEMENT OF POINTS PURSUANT TO
RULE 75(d) FRCP

The points upon which appellant intends to rely are as follows:

(1) The court erred in holding and finding that the writ of attachment served on E. T. Foley on December 5, 1946, remained a valid writ of attachment three years after said date, and that said writ created a lien upon the funds held by Foley, and that said funds were transferred to the Clerk of the Superior Court of the State of California subject to said lien.

(2) The court erred in holding and finding that the respondent did not receive a transfer of funds within four months prior to bankruptcy.

(3) The court erred in holding and finding that the trial [81] court in the case of E. T. Foley v. Riverside Iron & Steel Corporation specifically provided that said funds were not to be held in custodia legis.

(4) The court erred in holding and finding that the respondent received any moneys pursuant to any garnishment or writ of execution issued or served prior to November 21, 1950.

(5) The court erred in holding and finding that the instant action constituted a collateral attack upon the order directing the County Clerk to pay

\$5,478.20 to the Sheriff of the County of Los Angeles in addition to the writ of execution issued on November 21, 1950.

(6) The court erred in concluding that the respondent caused to be served on August 12, 1948, on the Superior Court of the State of California, a valid writ of attachment, and that such writ created a valid lien on such funds held by the County Clerk subject to final determination in the action of *E. T. Foley v. Riverside Iron and Steel Corporation*.

(7) The court erred in concluding that the funds deposited pursuant to order of court with the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, were not placed in custodia legis by virtue of the order of said court.

(8) The court erred in holding, finding, and awarding judgment to respondent Thomas A. Wood.

Dated: March 15, 1956.

ALEX D. FRED, and

LOUIS M. BROWN,

By /s/ ALEX D. FRED,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1956. [82]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 83, inclusive, contain the original

Claim;

Answer;

Stipulation of Fact;

Amendment to Stipulation of Fact;

Memorandum of Decision;

Motion for New Trial, etc.;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Statement of Points Pursuant to Rule 75(d)

FRCP;

Additional Designation of Contents of Record
on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court had on December 19, 1955, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 3rd day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15086. United States Court of Appeals for the Ninth Circuit. Lewis H. Saper, as Trustee in Bankruptcy of Riverside Iron & Steel Corporation, Appellant, vs. Thomas A. Wood, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 15086

LEWIS H. SAPER, as Trustee in Bankruptcy of
RIVERSIDE IRON & STEEL CORPORATION,
Appellant,

vs.

THOMAS A. WOOD,
Respondent.

DESIGNATION OF RECORD AND STATE-
MENT OF POINTS ON APPEAL (Rule 17)

Comes now the appellant, Lewis H. Saper, and adopts the Statement of Points and Designation of Contents of Record on Appeal and Additional Designation of Record on Appeal heretofore filed in the United States District Court for the Southern District of California, Central Division, as the Designation of Record and Statement of Points on which he intends to rely in this appeal.

Dated: April 9, 1956.

ALEX D. FRED, and

LOUIS M. BROWN,

By /s/ ALEX D. FRED,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 11, 1956.



No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside
Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLANT'S OPENING BRIEF.

ALEX D. FRED and

LOUIS M. BROWN,

756 South Broadway, Suite 524,
Los Angeles 14, California,

Attorneys for Appellant.

FILE

JUL 16 1956

PAUL P. O'BRIEN, CL



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No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside
Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal by the appellant, as Trustee in Bankruptcy of the Estates of Riverside Iron & Steel Corporation, hereinafter referred to as "Riverside" and Harlan H. Bradt, consolidated bankrupt estates, following judgment rendered against appellant by the United States District Court for the Southern District of California, Central Division, in an action brought to recover a preference allegedly obtained by the appellee.

Jurisdictional Statement.

The claim of the appellant alleged that the appellee had received a preference under Section 60 of the Bankruptcy Act (11 U. S. C. A. 96) in that within the period of four months prior to the filing of a voluntary petition in bankruptcy by Riverside in the United States Dis-

strict Court for the Southern District of New York, appellee had pursuant to a writ of execution received payment of an antecedent debt which enable the appellee to obtain a greater percentage of his debt than any other creditors in his class. The complaint further alleged that at the time of obtaining the lien and payment Riverside and Bradt were insolvent and that appellee had knowledge or reasonable cause to believe that Riverside and Bradt were insolvent. [Tr. pp. 3-6.]

Original jurisdiction of the cause was conferred upon the District Court by Section 60b of the Bankruptcy Act (11 U. S. C. A. 96) and this Court has jurisdiction of this appeal by reason of 28 U. S. C. A. 1291.

Statement of the Case.

The case was tried upon a stipulation of facts and amendment to stipulation of facts. (The entire written stipulation is set forth in the trial court's findings [Tr. pp. 37-56, incl.]) on the issue of whether appellee had any lien on the funds, admittedly received by him within the four-month period prior to bankruptcy, which antedated the four-month period. The question of whether Riverside was insolvent and appellee's knowledge of the same was left for future determination in the event that the trial court found in favor of appellant on the preliminary issues submitted to him under the written stipulation of facts. [Tr. pp. 48-49.]

The District Court originally entered judgment against the appellant on March 30, 1955. Appellant moved for a new trial. The motion was denied on December 19, 1955, but the court vacated the findings of fact and conclusions of law and judgment. [Tr. p. 36.] It thereafter made and filed new findings on January 23, 1956 [Tr.

pp. 37-60], and final judgment was entered against appellant on January 24, 1956. [Tr. pp. 61-62.]

Appellant gave notice of appeal on February 17, 1956. [Tr. p. 62.]

Statement of Facts.

On December 5, 1946, appellant filed a civil action in the Superior Court of the State of California, in and for the County of Los Angeles, to recover attorneys' fees for services rendered against Riverside. At that time he caused a writ of attachment to be levied against one E. T. Foley. [Tr. p. 38, par. I.]

Mr. Foley had earlier commenced an action in the same Superior Court against Riverside and others, in which Riverside had filed a cross-complaint, and said action was pending at the time. Foley made a return on the writ stating that he did not know whether or to what extent he was indebted to Riverside and referred to his pending action against Riverside. [Tr. p. 38.] For purposes of clarity the case involving Foley and Riverside will hereinafter be referred to as the "Foley action."

Judgment was entered in the Foley action on July 30, 1948. By the terms of said judgment Foley was ordered to and did in fact by August 1, 1948, deposit the sum of \$329,263.46 with the Clerk of the Superior Court. Under the terms of the judgment Riverside was entitled to receive "upon the date when this judgment shall have become final in the Court in which this proceeding shall be finally decided . . . the sum of \$82,619.69." [Tr. pp. 40-41, 49.]

On the same day that Foley deposited the money pursuant to the order of the Superior Court, Foley,

Riverside and several other attaching creditors signed a stipulation [Tr. p. 39, par. VII] which recites, insofar as it is pertinent here, that appellee had caused to be served a writ of attachment on Mr. Foley mentioned above; that Foley had made a return as recited above; and that the stipulation was not to be construed as an admission by defendants Riverside or Bradt that there is due or owing anything to anyone under the cases or attachments referred to in the stipulation. [Tr. pp. 51-54; the Stipulation was attached to the Stipulation of Facts herein as "Ex. B."]

After the deposit of the money by Foley, appellee procured another writ of attachment and had it served on the County Clerk and Clerk of the Superior Court on August 12, 1948. [Tr. p. 39.]

Thereafter in the Foley action Riverside made a motion for new trial, and the judgment was amended and entered on October 6, 1948, in Judgment Book 1967, page 163, of the Superior Court of Los Angeles County. [Tr. p. 48.]

Thereafter Riverside and Bradt took an appeal from the judgment; the case was affirmed on appeal by the District Court of Appeal of the State of California. (See *Foley v. Riverside Iron & Steel Corp.*, 99 Cal. App. 2d 431.) Riverside filed a petition for hearing in the Supreme Court of the State of California, which was denied, and its remittitur was filed in the Superior Court of Los Angeles County on November 20, 1950.

During the pendency of the Riverside appeal in the Foley action, appellee obtained judgment against Riverside in his own Superior Court action on April 8, 1949. On June 28, 1949, still during the pendency of the Riverside appeal in the Foley case, appellee caused a writ of execution to be served on the Clerk of the Superior Court. [Tr. p. 42.] The Clerk made a return stating that he held the sum of \$329,263.46 on deposit in the Foley action to be distributed to various litigants, among whom Riverside was one, upon said Foley action judgment becoming final. The Sheriff returned the writ of execution "wholly satisfied." [Tr. p. 47.]

Nothing further occurred until November 21, 1950, a day after the remittitur in the Foley action had been filed, finally ended all proceedings in the Foley action. It should be noted that all the events related in the preceding paragraphs antedated the four-month period. On that day appellee again caused to be served a writ of execution on the Superior Court Clerk. The Clerk made his return stating that he held the sum of \$82,219.08 on deposit "which amount is being held subject to further order of court." [Tr. p. 47.] Thereafter on December 1, 1950, appellee caused an order to show cause, returnable on December 8, 1950, to be served on the Clerk and others, requiring the Clerk to show cause why he should not be ordered to pay to the Sheriff the sums necessary to satisfy the judgment of appellee against Riverside. [Tr. pp. 42-43, 55-56.] The Superior Court thereafter on December 8, 1950, made its order directing the Clerk to pay over to the Sheriff the sums needed

to satisfy the judgment and interest, *i. e.*, the sum of \$5,838.49, and Wood on January 3, 1951, received the sum of \$5,800.07. [Tr. p. 45.] The Sheriff made his return, stating:

“I hereby certify that under and by virtue of the within hereunto annexed writ by me received on the 20th day of November, 1950, I did, on the 21st day of December, 1950, collect from Harold J. Ostly, County Clerk of Los Angeles County (remitted to Sheriff in Superior Court Case 520-858-Foley v. Riverside Iron and Steel Cpn.—with Court Order directing application in Case 522-523) the sum of \$5,848.49 and . . . (after deducting his fees) leaving a net balance of \$5,800.07 which has been paid to the attorney for creditor by County Warrant, in partial satisfaction.” [Tr. pp. 45-46.]

On March 14, 1951, within the four-month period after the last writ of execution was served, Riverside filed its voluntary petition in bankruptcy and was adjudicated a bankrupt. [Tr. p. 46.]

Applicable Statutes.

1. Section 542b, *Code of Civil Procedure of California*, provides in part:

“An attachment or garnishment on personal property . . . shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation of such attachment or garnishment, at the expiration of three years after the issuance of the Writ of Attachment under which said levy was made; and the property levied on shall be delivered to the defendant on his order. . . .”

2. Section 688 of the *Code of Civil Procedure*, provides in part:

“ . . . until a levy, the property is not affected by the execution; but no levy shall bind any property for a longer period than one year from the date of the issuance of the execution.”

3. Section 60a (1) of the *Bankruptcy Act* provides:

“A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.”

4. Section 60b of the *Bankruptcy Act* provides in part:

“Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

5. Section 67a (1) of the *Bankruptcy Act* provides in part:

“Every lien against the property of a person obtained by attachment, judgment, levy or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . .”

Summary of Argument.

It is evident that appellee received payment on account of an antecedent debt within the four-month period prior to the bankruptcy of Riverside. Such payment under the issues before the trial court was a preferential transfer within the meaning of section 60a of the Bankruptcy Act, unless appellee had obtained a lien on said moneys at some period prior to the four-month period which remained valid and subsisting at the time the actual transfer to him was made.

It is appellant's contention that payment to appellee was made, only be reason of the writ of execution served on the Clerk of the Superior Court of Los Angeles County on November 21, 1950, a time within the four-month period. For the reasons to be hereinafter expounded, appellant contends that all the prior levies were either (1) ineffective to have constituted a lien; or (2) had expired and ceased to be of any force or effect prior to November 21, 1950.

In the argument which follows, appellant will analyze each levy or other event that either gave or may have given appellee a lien on the moneys ultimately transferred to him and will discuss the legal effect of such levies.

Under Point I, appellant will discuss the writ of attachment of December 5, 1946, and show that under California law the lien acquired thereby expired by December 5, 1949, long prior to the time when appellee received the transfer of money which is the subject of appellant's claim.

Under Point II appellant will discuss the writ of attachment of August 12, 1948. With respect to this levy, appellant will contend that it was ineffective to constitute a lien because the money was in custody of the law and not subject to attachment or executions, and that therefore the findings of the District Court were erroneous.

In Point III appellant will discuss the effect of the writ of execution of June 28, 1949, which the District Court found to be ineffective to give appellee a lien. Appellant contends that this finding is inconsistent with the District Court's finding that the money deposited with the Clerk of the Superior Court was not in *custodia legis*. And that, if in fact the latter finding is correct and the money was not in *custodia legis*, the District Court erred in not finding that the execution writ of June 28, 1949, was effective and that the lien of the earlier attachment merged with it and ultimately expired one year thereafter.

In Point IV appellant contends that the appellee received payment on account of his prior judgment against Riverside only by virtue of the writ of execution served on the Clerk on November 21, 1950, a time within the four-month period of Riverside's bankruptcy, and that this action does not constitute a collateral attack on the Superior Court order of December 8, 1950.

ARGUMENT.

I.

The Writ of Attachment Served on December 5, 1946, Ceased to Be Effective After Three Years.

A. Under California Law a Lien Acquired by Garnishment on Personal Property Has No Force or Effect After Three Years From the Date of Its Issuance.

The first writ of attachment* which could possibly give rise to a lien antedating the four-month period of bankruptcy was the one served on E. T. Foley on December 5, 1946.

Regardless of the validity of this garnishment, and for the purpose of this appeal, appellant assumes that it was good and effective when served, it ceased to have any force or effect long prior to the time in which appellee received payment on his judgment. This for the reason that under the law of the State of California, a garnishment or attachment on personal property endures only for three years. After that time such levy ceases to have any effect or force.

Thus Section 542b of the California Code of Civil Procedure provides:

“An attachment or garnishment on personal property, . . . shall, unless sooner released or discharged, cease to be of any force or effect and the property levied on be released from the operation

*Throughout this brief, the word “attachment” is intended to be used interchangeably with the word “garnishment.” Under California procedure a court issues a writ of attachment which may be used to garnish property or credits belonging to a debtor but under the control of a third person. All the levies involved herein were in fact garnishments or executions. (Calif. Code Civ. Proc., Secs. 537-545.)

of such attachment or garnishment at the expiration of three years after the issuance of the writ of attachment under which said levy was made; . . .”

B. An Attachment Lien on Personal Property Cannot Be Extended or Revived Beyond the Three-year Period of Its Existence.

Attachment is purely a creature of statute. The rights and obligations acquired by virtue of such statutory remedy must be measured by the statute itself. *Loveland v. Mining Co.*, 76 Cal. 562, 564-565; *Hamilton v. Bell*, 123 Cal. 93, 95. Thus a reading of the statute makes it clear that, after the three-year period in which an attachment on personal property exists, the lien acquired ceases and is incapable of revivor.

In the *Loveland* case, *supra*, the Supreme Court of California, in answering an argument that the duration of an attachment lien could be extended, stated:

“As attachment is merely a creature of statute, its existence and operation in any case can continue no longer than the statute provides it may.”

And, the rule is expressed in 6 *Cal. Jur.* 2d, 41-42, as follows:

“The statutes make no provisions for the extension of the lien on personal property beyond the original three-year period. At the end of this time, it therefore ceases to be of any force or effect, and the property is released from the operation of the process.”

Based on the foregoing principles of law, it is submitted that the trial court erred in finding that appellee “received said money pursuant to garnishment served on E. T. Foley on December 5, 1946, . . .” [Tr. p. 58,

par. 6.] The levy, in the language of the statute, would have ceased to have “any force or effect” by December 5, 1949, more than a year before appellee actually received the money.

C. The Clerk Did Not Take the Money Deposited by Foley Subject to the Lien of the Garnishment; in Any Event the Lien Would Have Expired.

Appellant submits that the District Court also erred in finding that Mr. Foley deposited the moneys with the Clerk of the Superior Court subject to the lien of the December 5, 1946, levy. [Tr. p. 59, par. 5.]

Under California law a garnishment does not create a lien on any specific fund. The attaching creditor obtains only a potential right or a contingent lien. *Puissegur v. Yarbrough*, 29 Cal. 2d 409. In the event that he obtains judgment against his debtor, he may hold the garnishee personally liable to the extent of the garnishee's indebtedness to the debtor. Calif. Code Civ. Proc., Sec. 544. This liability cannot be transferred to another person. Thus the garnishment levied upon Mr. Foley was ineffective to make the Clerk liable as a garnishee, nor, it is submitted, did it create any lien on the moneys held by the Clerk. *Finch v. Finch*, 12 Cal. App. 274, 284.

In any event, if the Clerk in fact received the moneys subject to the lien, the lien expired three years after its issuance, *i. e.*, by December 5, 1949. Code Civ. Proc., Sec. 542b.

II.

The Writ of Attachment Served on the Superior Court Clerk on August 12, 1948, was Ineffective Because the Money Was in Custodia Legis and Not Subject to Attachment During the Pendency of the Foley Action Appeal.

The second writ of attachment procured by the appellee was the one served on the Clerk of the Superior Court on August 12, 1948. The court below found that appellee received the money not only pursuant to the garnishment of December 5, 1946, but also “pursuant to garnishment served upon the Clerk . . . on the 12th day of August, 1948” [Tr. p. 59, par. 6], and as a conclusion of law held that the latter levy was a “valid writ of attachment.” [Tr. p. 59, par. 3.]

It is appellant’s contention that the finding and conclusion of the trial court is erroneous for either of two reasons: (1) The levy was ineffective because the fund in the possession of the Clerk of the Superior Court was in custody of the law and immune from attachment or execution; or (2) if not in *custodia legis*, it merged with the lien of the writ of execution served on the Clerk on June 28, 1949, and expired one year after the later date, *i. e.*, by June 28, 1950. This first reason will be discussed immediately below; the second in the following point (Point III) of this Argument.

In amplification of the first reason, appellant submits that the funds held by the Clerk of the Superior Court were necessarily in *custodia legis* and not subject to attachment. The stipulated facts show that the Clerk received the money on or about August 1, 1948, pursuant to an order of the Superior Court in the Foley action. [Tr. p. 39, par. 8, p. 30.] The order, a part

of the court's judgment, provided that Foley was to deposit certain sums of money and that the Clerk should distribute the same to the parties in the Foley action only after the Foley judgment "shall have become final in the court in which this proceedings shall be finally decided." [Tr. p. 41.] The Foley action did not become final until November 20, 1950, when the remittitur on appeal was filed with the Superior Court. Until such time, the Foley action remained pending. (*Code Civ. Proc.*, Sec. 1049; *Turner v. Donovan*, 52 Cal. App. 2d 236; *Pacific Gas & Electric Co. v. Nakano*, 12 Cal. 2d 711; 3 Cal. Jur. 2d 674.)

Thus, it is evident that on August 12, 1948, when the Clerk was served with appellee's second writ of attachment, the funds which he sought to garnish were in the lawful custody of the Superior Court, having been placed there pursuant to an order of the Court. *The Clerk as an officer of the court was not subject to the garnishment and it was ineffective for any purpose.* The rule is well settled that property placed in *custodia legis* by order of court is not subject to the levy of a writ of attachment or other similar process.

Dunsmoor v. Furstenfeldt (1891), 88 Cal. 522, 527;

Van Orden v. Anderson, 122 Cal. App. 132, 141;
Culver v. W. B. Scarborough, 73 Cal. App. 455, 457;

Durkin v. Durkin, 133 Cal. App. 2d 283, 294;
5 Cal. Jur. 2d 649;

4 Am. Jur. 795.

A careful reading of the cited cases shows that money deposited pursuant to an order of court in a pending case

remains immune from attachment until the action is finally concluded. The rationale of the rule, as stated in *Dunsmoor v. Furstenfeldt*, *supra*, at page 527, is that to permit attachment would "generally delay and embarrass judicial and other official proceedings in the administration of such property." But when all proceedings in an action have terminated and "the officer has nothing more to do with the fund than to pay it over," he becomes subject to garnishment.

In the instant case, appellant submits, that as long as the appeal in the Foley action remained pending, the moneys deposited with the Clerk of the Superior Court were not subject to garnishment or execution.

In order to support its finding that the August 12, 1948, garnishment was valid, it was necessary for the court below to find that the funds held by the Clerk of the Superior Court were not in *custodia legis*. Thus the District Court found that the Superior Court in the Foley action "specifically provided, however, that said fund was *not to be held in custodia legis* and that the Clerk was to pay out said fund to the persons entitled thereto upon final judgment in the action." [Tr. p. 57, par. 4.]

It is submitted that such finding is erroneous. Nowhere in the judgment in the Foley action is there any express order that the funds were not to be placed in *custodia legis*, nor can such intention be implied. On the contrary, the order provided that the money deposited with the Clerk was to remain in his possession until the final determination of the case.

III.

If the Money in the Clerk's Possession Was Not in Custodia Legis the Writ of August 12, 1948, Merged Into the Execution Writ of June 28, 1949, and Appellee's Lien Would Have Expired on June 28, 1950.

Even if the District Court was correct in finding that the funds in the possession of the Clerk were not in *custodia legis*, and that the August, 1948, garnishment was effective, the court still erred in finding that the latter writ had any force or effect one year after the issuance of the writ of execution.

Assuming that the funds were not in *custodia legis*, it must necessarily follow that the writ of execution served on the Clerk of the Superior Court on June 28, 1949, was also valid and should have been given full force and effect. The duration of an execution lien is one year. *Code Civ. Proc.*, Sec. 688.

The question arises: What is the effect upon the duration of a writ of attachment where prior to the three-year period provided by statute for its duration, the party obtains judgment and causes to be served on the garnishee a writ of execution?

The cases construing California law make it clear that the answer is that a writ of attachment cannot endure beyond the one-year period of the existence of the lien acquired by the service of the writ of execution. Upon the service of the writ of execution, the lien, if any, acquired by a prior attachment, merges into the lien obtained by the writ of execution.

Puissigur v. Yarbrough, 29 Cal. 2d 409, 412;

Jones v. Toland, 117 Cal. App. 481, 483;

Durkin v. Durkin, 133 Cal. App. 2d 283, 293-295.

Thus, in *Jones v. Toland*, *supra*, the court held at page 483:

“Appellant contends that section 542b of the Code of Civil Procedure, which provides that an attachment or garnishment shall be of no effect at the expiration of three years after the issuance of the writ of attachment, applies to garnishments under execution. In our opinion this section relates solely to proceedings taken prior to judgment, and is not applicable to proceedings upon execution. This is apparent from a mere reading of the statute, which refers to a release of the levy thereunder by dismissal of the action or by entry and docketing of the judgment in the case, such contingencies would not have been mentioned if the legislature had in mind proceedings subsequent to judgment. If the argument of appellant prevailed, the limit of one year upon executions would be absolutely nullified, and three years would be allowed for all executions. The three-year period for attachments and garnishments was considered by the legislature as a reasonable time within which a litigant could subject attached property to any judgment which might be obtained, while the one year limitation was considered a reasonable time for realizing upon the fruits of the judgment, with the right to an alias execution thereafter.”

The most recent expression of the California courts is the opinion of the District Court of Appeal in *Durkin v. Durkin* (1955, D. C. A. 1st), 133 Cal. App. 2d 283, 293-295, where the respondents had served a writ of attachment upon their debtor's bank on November 2, 1950. The court held that a valid lien had been created in their favor. Respondents obtained judgment in their action against the debtors on January 8, 1951, and caused a writ of execution to be served on the bank. The court

held that under such circumstances "the writ of execution expired on January 8, 1952, one year after the issuance of the writ and it was not extended by the three-year period in which an attachment endures. The court stated at page 294:

"These respondents further contend that their attachment continued in force for three years and thus continued the life of their lien until after the property entered legal custody. They rely upon section 542b of the Code of Civil Procedure which declares that an attachment or garnishment on personal property "shall, unless sooner released or discharged, cease to be of any force or effect . . . at the expiration of three years. . . . This, we observe, is not an affirmative statement that a garnishment shall endure for three years unless sooner released or discharged. It is a statement that it shall not endure longer than three years. This is consistent with the traditional concept that the lien of an attachment is merged in the lien of the judgment in the case of real property or with the lien of a writ of execution in the case of personal property. . . . No California decision deciding this precise question has come to our attention. In *Puissigur v. Yarbrough*, *supra*, 29 Cal. 2d 409, 412, the three-year period against the attachment as well as the one-year period against the execution levy had run. . . . In New York the question has been decided. There, it is definitely settled that the lien of an attachment upon personal property merges and terminates in the lien of the execution levy. (*Castriotis v. Guaranty Trust Co.*, 229 N. Y. 74 [127 N. E. 900, 902]; *Marks v. Equitable Life Assur. Soc.*, 109 Appl. Div. 675 [96 N. Y. S. 551, 552]; and earlier cases cited in each.)

"Accordingly, we hold that the same rule obtains in California. . . ."

If appellant's analysis is correct the lien acquired by appellee by virtue of the August 12, 1948, writ of attachment would have merged with the lien obtained by virtue of the writ of execution of June 28, 1949, and would have expired by June 28, 1950, approximately five months prior to the time appellee obtained a transfer of the money, which is the subject of the instant lawsuit.

To avoid the effect which appellant believes he has demonstrated results if the funds were not in *custodia legis*, the District Court found that the writ of execution of June 28, 1949, was ineffective and that the "fund in the hands of the Clerk was not subject to a writ of execution under Section 688 of the Code of Civil Procedure." [Tr. p. 57, par. 5.]

It is evident that this finding is wholly inconsistent with the finding that the fund was not in *custodia legis*. The two findings cannot be reconciled. If, on the one hand, the fund was not in *custodia legis*, as the court below found, and therefore subject to a writ of attachment, it is submitted, that the court should have also found that the fund was equally subject to a writ of execution. It would follow, in accordance with the cases cited above, that the lien acquired by the August, 1948, attachment expired on June 28, 1950, *i. e.*, one year after service of the writ of execution.

On the other hand, if the fund was in *custodia legis* during the pendency of the appeal in the Foley case, neither of the above mentioned writs was effective to give appellee a lien on the money held by the Clerk.

Appellant believes that the latter alternative correctly expresses the effect of the writs under California law and should be followed.

IV.

Appellee Obtained the Funds in Issue Only as a Result of the Writ of Execution Issued on November 21, 1950, a Time Within the Four Months Before Bankruptcy.

On November 20, 1950, the remittitur in the Foley action was filed in the Superior Court. The next day appellee caused a new writ of execution to be served on the Superior Court Clerk. [Tr. p. 47.] When the funds were not forthcoming he filed an affidavit in the Foley action and obtained an order to show cause. After a hearing, the Superior Court directed the Clerk to pay over to the Sheriff the sum necessary to satisfy Wood's judgment. The language of the order clearly shows that it was made by reason of the November 21st writ. Thus the court ordered that the money be paid:

“ . . . in response to the writ of execution issued in that certain action (Wood v. Riverside) . . . ”
[Tr. p. 44.]

And the Sheriff in returning the writ certified in his Sheriff's Collection Return as follows:

“ . . . that under and by virtue of the within hereunto annexed writ by me received on the 20th day of November, I did on the 21st day of December, 1950, collect . . . the sum of \$5,838.49. . . . ” [Tr. p. 45, par. 14.]

The trial court found that the writ of execution of November 21, 1950, was effective and that appellee received the money pursuant to such writ. [Tr. p. 58.] Appellant has no quarrel with this finding but contends that the foregoing argument has demonstrated that it was the only writ valid and subsisting at the time appellee received the money.

The failure of the Clerk to honor the writ caused the Superior Court to issue its order of December 8, 1950, directing the Clerk to pay over to the Sheriff the sums due on appellee's judgment against Riverside. Within four months after this writ and order, Riverside filed its petition in bankruptcy.

Thereafter appellant commenced this action in the District Court to recover the money received by appellee. The District Court held that such action constituted "a collateral attack upon a final order" of the Superior Court to pay the appellee the money. . . . "in satisfaction of the writ of execution issued November 21, 1950." [Tr. p. 60, par. VII.]

Rather than attacking the order, appellant seeks to rely upon it. Appellant does not contend that the Superior Court's order was erroneous. In fact, he contends the December 8, 1950, order and the Sheriff's return thereon, show that appellee received the money only by virtue of a writ of execution which was issued within the period of four months prior to the bankruptcy of the Riverside Iron and Steel Corporation. The question of the preference could not have been litigated in the Superior Court at the time the December 8, 1950, order directing payment to appellee was made for the reason that Riverside was not then in bankruptcy.

V.

Conclusion.

Appellant submits that the record conclusively shows that all the writs of attachment and executions served prior to November 21, 1950, were not effective to give appellee any lien on the funds he ultimately received or the lien, if any acquired, ceased to exist, by reason of

the statutory limits on their duration, prior to November 21, 1950. Appellant believes that the conclusion must be reached that the only subsisting lien on the funds was the one which arose through service of the writ of execution of November 21, 1950. As shown by the argument, this lien was obtained within the four-month period prior to the filing of the petition in bankruptcy of Riverside.

The District Court, appellant submits, was in error in finding that appellee had a valid lien on the money which antedated the four-month period prior to bankruptcy. Appellant therefore urges this court to reverse the judgment and remand the case for further proceedings on the issues reserved for determination in the District Court.

Respectfully submitted,

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LOUIS M. BROWN,

By ALEX D. FRED,

Attorneys for Appellant.

No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of RIVERSIDE
IRON & STEEL CORPORATION,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLEE'S BRIEF.

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THOMAS A. WOOD,
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Los Angeles 13, California,
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FILED

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PAUL P. O'BRIEN, CLERK

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No. 15086

IN THE

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LEWIS H. SAPER, as Trustee in Bankruptcy of RIVERSIDE
IRON & STEEL CORPORATION,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

This is an appeal by the appellant as trustee in bankruptcy of the estates of Riverside Iron and Steel Corporation and Harlan H. Bradt, consolidated bankrupt estates. Judgment was rendered against the appellant by the United States District Court of the Southern District of California, Central Division.

The claim of the appellant alleged that the appellee had received a preference under Section 60 of the Bankruptcy Act (11 U. S. C. A. 96) in that, within a period of four months prior to the filing of a voluntary petition in bankruptcy by the Riverside Iron and Steel Corporation in the United States District Court for the Southern District of New York, appellee had pursuant to writ of execution received payment of an antecedent debt which, if permitted to stand, would permit appellee to obtain a greater

percentage of his debt than any other creditor in his class. The complaint further alleged that at the time of the obtaining of the lien and payment, Riverside was insolvent and that appellee had knowledge or reasonable cause to believe that Riverside was insolvent.

Statement of the Case.

The case was tried upon a stipulation of facts and amendment to the stipulation of facts, the issues of whether or not Riverside was insolvent at the time of the obtaining of the lien and the subsequent payment and the question of whether or not the appellee had knowledge or reasonable cause to believe Riverside was insolvent was reserved for further hearing in the event that it was held that both the lien and the payment were obtained within four months prior to the voluntary petition in bankruptcy filed by Riverside.

The stipulation of fact has been incorporated in its entirety in the findings of fact. [Tr. p. 37.]

On December 5, 1946, Thomas A. Wood filed an action against Riverside Iron and Steel Corporation for attorney's fees in the sum of \$4,012.90 together with interest thereon at the rate of 7% per annum from the 27th day of June, 1944. [Tr. p. 38.]

That in said action and on December 5, 1946, a writ of attachment issued out of the Superior Court of the State of California, in and for the County of Los Angeles, directed to E. T. Foley. Said writ of attachment was by the Sheriff of Los Angeles County on December 5, 1946, served upon the said E. T. Foley. [Tr. p. 38.]

That on the 16th day of December, 1946, E. T. Foley made return stating that he was unable to state whether

or to what extent he had in his possession or under his control any credits or other personal property belonging to the Riverside Iron and Steel Corporation, or whether or to what extent he was indebted to said Riverside Iron and Steel Corporation. [Tr. p. 38.]

That on August 4, 1948, E. T. Foley made a supplemental answer to the writ of attachment theretofore served upon him by the Sheriff of Los Angeles County in which he recited, among other things, the deposit with the Clerk of the Superior Court of the State of California, pursuant to order of court, of the sum of \$329,263.46, of which \$82,619.63 was for the use and benefit of Riverside Iron and Steel Corporation and Harlan H. Bradt. [Tr. pp. 49-50.]

Prior to the deposit of said funds with the Clerk of the Superior Court of the State of California, a stipulation was entered into by E. T. Foley, Riverside Iron and Steel Corporation and Harlan H. Bradt, by and through their respective counsel, reciting among other things that an attachment had been served upon Foley in the action Wood v. Riverside Iron and Steel Corporation.

This stipulation was subsequently joined by all other counsel involved in the case of Foley v. Riverside Iron and Steel Corporation. The stipulation appears in Transcript, page 51.

The judgment in Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt, after providing for the deposit of the money with the Clerk of the Superior Court of the State of California, provided that:

“The court recognizes the possibility that one or more writs of attachment and one or more writs of execution may be served upon the Clerk which ulti-

mately and lawfully may require him to pay over to an enforcement officer part or all of the funds hereinabove ordered to be paid severally to one or more named distributees. It is not this court's intention to enjoin the Clerk from the performance of any such duty, and should he in the performance of such a duty pay over to an enforcement officer any portion of the fund otherwise payable hereunder to a certain distributee, any and all sums so paid over shall be deemed, for the purpose of distribution herein ordered, to have been paid by the Clerk to said distributee and shall be charged against and deducted from the full sum otherwise payable hereunder to said distributee." [Tr. pp. 41-42.]

The judgment further provides:

"That upon the date when this judgment shall have become final in the court in which this proceeding shall be finally decided, the Clerk of the Superior Court shall forthwith and without further order of this court distribute and pay said sum of \$329,263.46 to the parties to this action now to be named and in the several amounts as follows: * * * To Riverside Iron and Steel Corporation and Harlan H. Bradt the sum of \$82,619.69 * * *." [Tr. p. 41.]

Judgment was entered in favor of Wood and against the Riverside Iron and Steel Corporation on April 8, 1949. On June 28, 1949, a writ of execution was issued out of the Superior Court of the State of California, and by the Sheriff served upon the County Clerk. [Tr. p. 42.]

To the writs of execution issued in the action of Wood v. Riverside Iron and Steel Corporation, the County Clerk made return that he was holding certain moneys pending the final judgment in the action.

On December 1, 1950, there was issued out of the Superior Court of the State of California, in and for the County of Los Angeles, an order to show cause in action No. 520858, styled E. T. Foley, plaintiff, vs. Riverside Iron and Steel Corporation, a corporation, Harlan H. Bradt, *et al.*, defendants, in which it was ordered that Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, and *LeRoy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt in the above entitled cause* (emphasis added), show cause why an order should not be made in the above entitled action directing Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, to pay to the Sheriff of the County of Los Angeles, in satisfaction of the judgment entered in Wood vs. Riverside Iron and Steel Corporation, out of funds on deposit with the County Clerk in the above entitled action the sum of \$4,012.98 with interest at the rate of 7% per annum from the 27th day of June, 1944, plus \$18.00 costs, in satisfaction of the judgment of Wood vs. Riverside Iron and Steel Corporation. [Tr. pp. 55-56.]

That order to show cause came on for hearing on the 8th day of December, 1950, and the Superior Court made the following findings and order:

“The above entitled matter coming on for hearing on the 8th day of December, 1950, pursuant to order to show cause issued on the 1st day of December, 1950, Thomas A. Wood appearing for the moving party and Harold W. Kennedy, County Counsel, by John B. Anson, Deputy County Counsel, appearing for Harold J. Ostly, County Clerk and Clerk of the

Superior Court of the State of California, in and for the County of Los Angeles, *Leroy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt having been served with said order to show cause on the 1st day of December, 1950 and having defaulted and the default of the said Leroy B. Lorenz having been entered* [emphasis added], the matter having been submitted to the court for decision on the affidavits and oral argument,

NOW THEREFORE, Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, is hereby ordered to pay over to Eugene W. Biscailuz, Sheriff of the County of Los Angeles, State of California, the sum of \$4,012.98 with interest at the rate of 7% per annum from the 27th day of June, 1944, plus \$18.00 costs, in response to the writ of execution issued in that certain action styled Thomas A. Wood vs. Riverside Iron and Steel Corporation, a corporation, numbered 522523 and heretofore served upon said Harold J. Ostly, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by said Sheriff, and to pay said money out of funds heretofore deposited in the above entitled action by the plaintiff E. T. Foley pursuant to order of court, for the use and benefit of Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt.” [Tr. pp. 44-45.]

That pursuant to said order, the Clerk of the Superior Court of the State of California paid out of the funds then in his possession to the Sheriff of the County of Los Angeles the sum of \$5,838.49. [Tr. p. 45.]

Following the entry of judgment in the Superior Court of the State of California, in and for the County of Los Angeles, in the case of E. T. Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt, the Riverside Iron and Steel Corporation and Harlan H. Bradt took an appeal to the District Court of Appeal, Second Appellate District, State of California; that said judgment was affirmed by the District Court of Appeal of the State of California; that a petition for hearing in the Supreme Court was denied and a remittitur filed in the Superior Court of Los Angeles County on the 20th day of November, 1950. [Tr. p. 48.]

The Writ of Attachment Served on December 5, 1946, Remained Effective Until Long After the Judgment in Foley v. Riverside Iron and Steel Corporation Became Final.

The first writ of attachment giving rise to a lien in favor of Wood was served on E. T. Foley on December 5, 1946. The validity of this garnishment is not challenged in this action. Foley, on August 1, 1948, pursuant to order of court, deposited with the Clerk of the Superior Court of the State of California the moneys involved in the garnishment. At that time 19 months of the 3-year period provided for by Section 542(b) of the California Code of Civil Procedure had expired. The money was deposited with the Clerk to be paid out by him "when this judgment shall have become final in the court in which this proceeding shall finally be decided." This was on the 30th day of November, 1950.

Appellant's argument is that in Foley v. Riverside Iron and Steel Corporation, the money deposited with the Clerk was by such judgment placed *in custodia legis*;

that thereafter and while *in custodia legis* it was not subject to attachment or to execution, that the period provided by Section 542(b) of the California Code of Civil Procedure continued to run, to the end of the three years, counting the period prior to the deposit *in custodia legis*, counting the time that the money was *in custodia legis*, that at the end of 3 years from December 5, 1946, the lien ceased to exist; that Riverside Iron and Steel Corporation, by taking an appeal thus preventing Wood from collecting his judgment, obtained an advantage which its trustee in bankruptcy can now urge in his attempt to collect from Wood. Contending the lien on the fund was created by the writ of execution issued on the 21st day of December, 1950.

The reason that the Clerk could not pay the money out prior to final judgment was that he was enjoined from so doing by the judgment in *Foley v. Riverside*. Section 356 of the Code of Civil Procedure provides:

“When the commencement of an action is stayed by an injunction or statutory prohibition, then the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.”

By analogy here the County Clerk was enjoined from paying out moneys on deposit with him pursuant to a writ of execution until such time as the judgment became final. The time in which the lien of the attachment would expire was stayed pending the final determination in *Foley v. Riverside Iron and Steel Corporation*.

Appellant Argues That the Attachment or Garnishment Created No Lien on the Fund or Credit in the Hands of Foley Other Than the Right of the Attaching Creditor to Collect His Judgment From Foley in the Event That Foley Failed to Retain in His Possession the Fund or the Credit.

Appellant ignores the fact that Foley paid the fund into court pursuant to order of court, ignores the fact that the lien created by an attachment or garnishment upon credits has nothing to do with the possession of the property. The lien is created when the writ is served upon the person holding the credits and the credits in the possession of the holder are subject to the lien.

Bank of America v. Riggs, 39 Cal. App. 2d 679 at 683, 104 P. 2d 125.

Further it is the law in California that with the service of the attachment or garnishment a lien is obtained on defendant's title to the property in the hands of the garnishee. This was held in *Kimball v. Richardson Kimball Company*, 111 Cal. 386 at 389, 43 Pac. 1111, where the court says:

"It is further contended that if a lien by direct attachment were sufficient to give the intervener a standing in court, he claimed no such lien but only to have a garnishment which creates no lien on the property.

"Garnishment under our law is but another name for the service of a writ of attachment upon personal property in the possession of persons other than the defendant in the writ and also to secure debts, credits, etc. in the hands of such third persons.

"By the service in the manner provided by statute, whether it be termed garnishment or service of the

attachment, while the possession is not necessarily disturbed, 'a lien is obtained on defendant's title to the property in the hands of the garnishee.' (*Wade on Attachments*, Section 338.)"

This is the rule adopted by the weight of opinion in the United States. This is pointed out in 5 American Jurisprudence, page 88, paragraph 817:

"With respect to the binding effect of garnishment on the property garnished, the weight of opinion is that such process operates as an attachment and fastens upon the property or debt a lien by which it is brought under the jurisdiction of the court. According to this view, then, a garnishment has the same effect as an attachment in bringing the property or debt garnished into *custodia legis* although the garnished property is left in the hands of the garnishee or receptor whose office with respect to the garnished property is said to be that of a bailee of the attaching or garnishing officer which, in many jurisdictions, he is expressly called. * * *

The appellant states that the Clerk did not take the money deposited by Foley subject to the lien of attachment, the authorities above cited are to the effect that the lien attached to the property. Deposit was made with the Clerk pursuant to order of court. The appellee was not before the court in *Foley v. Riverside Iron and Steel Corporation* and his rights could not be destroyed by such an order. The appellant states, "The attaching creditor obtains only a potential right or contingent lien and cites *Puissegur v. Yarrowborough*, 29 Cal. 2d 409 (175 P. 2d 830), the court makes that statement at page 412 and cites in support of it 5 American Jurisprudence 94; 3 California Jurisprudence 477. 5 American Jurispru-

dence, page 94, under the paragraph dealing with contingent and inchoate character of lien says:

“An attachment or garnishment lien is said to be contingent or inchoate at least until final judgment against the defendant and the garnishee.”

In other words, all that the court was saying in the above cited case was that the attachment lien could be destroyed by failure of the attaching creditor to secure a judgment.

In 3 Cal. Jur. 477, the court says:

“The right secured by an attachment being merely contingent and depending upon the recovery of judgment by the plaintiff, it necessarily follows that a final judgment for the defendant *ipso facto* works a dissolution of the attachment.”

The case of *Finch v. Finch*, 12 Cal. App. 274, 107 Pac. 594, is not in point. In the *Finch* case a garnishee did not retain the money in its possession. It paid it to the sheriff on a subsequent execution. In the case at bar, Foley made his return to the writ of attachment served on December 5, 1946, that he did not know how much, if anything, he had in his possession belonging to the Riverside Iron and Steel Corporation and that that matter would be determined in an action that was then pending styled *Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt*. It was determined in *Foley v. Riverside Iron and Steel Corporation* that Riverside Iron and Steel Corporation and Bradt were entitled to the sum of \$82,619.69 when the judgment became final. As a part of this determination the court required Foley to deposit this money with the Clerk of the Superior Court. Foley did not voluntarily dispose of it to the Sheriff in another attachment as did the bank in *Finch v. Finch* and

put it beyond the reach of the plaintiff in the attachment action. In the case at bar the money was preserved intact and transferred by order of court, which Foley had to obey, from Foley to the Clerk.

The Period of Time Between the Deposit of the Money in Court and the Final Judgment in *Foley v. Riverside Iron and Steel Corporation* Is Not Counted in Determining the Three Years in Which the Lien of the Attachment Remains Pursuant to Section 542(b) of the Code of Civil Procedure.

In the *Estate of Troy*, 1 Cal. App. 2d 732, 37 P. 2d 471, a writ of attachment was issued on certain personal property in the estate, which property was to be received by Beatrice H. Hanks as a residuary legatee. The attachment was levied in August of 1927. In March of 1928, Beatrice H. Hanks was adjudicated a bankrupt. In April, 1928, the Credit Clearance Bureau obtained a judgment against Beatrice H. Hanks upon which execution has been issued. The point was made in the case that the 3-year period provided for under Section 542(b) of the Code of Civil Procedure, had expired and that the attachment had lapsed, the same point being made in the case at bar. The court, on page 734 says:

“In approaching the questions presented on this appeal, it should be borne in mind that though the decedent died in April, 1925 and the decree of distribution was not made until January, 1934, the the parties concede that the delay was due to litigation involving the estate and was not in any way due to any lack of diligence on the part of respondents herein.”

The court then discusses another attachment and after holding that there was no property left in the estate to which the other attachment could attach, says:

“The portion of the decree relating to the lien of the Credit Clearance Bureau is not affected by the foregoing. The attachment was levied after the realty had been converted into cash and the claim was reduced to judgment before distribution and before Beatrice H. Hanks was adjudged a bankrupt. The only question raised by appellant relative to this portion of the decree is whether the lien of the attachment lapsed on the expiration of the period of three years from the date of the levy under the provisions of Section 542(b) of the Code.”

The court then discusses Section 561 of the Code of Civil Procedure, a special statute dealing exclusively with the attachment of the interest of an heir or legatee in personal property of an estate, and on page 736 continues:

“Section 542(b), which limits the life of an attachment lien to three years from the date of the levy, is a general provision enacted for the purpose of compelling diligence on the part of the attaching creditor. (*Jones v. Toland*, 117 Cal. App. 481, 483 [4 Pac. (2d) 178].) This reason does not apply where an attachment is levied upon the interest of an heir or legatee because the attaching creditor has no power to control the proceedings in probate. When the reason for the rule ceases, the rule ceases, and when the rule can be applied only by implication, it should not be applied when there is no reason for it. There are many authorities holding that where a right existed in common law, a statutory remedy is merely cumulative, but that, where the right is given and the remedy is provided by statute, the statutory

remedy must be pursued. (*People v. Craycroft*, 2 Cal. 243, 244 [56 Am. Dec. 331]; *Estate of Ward*, 127 Cal. App. 347, 354 [15 Pac. (2d) 901].) This respondent has strictly followed the remedy provided in the statute and we can see no reason why it should be denied the right because those over whom it had no control delayed the proceedings.

In *The Morris Plan Company v. The State of California*, 73 Cal. 2d 415, 166 P. 2d 627, The Morris Plan Company brought an action against the State of California alleging the payment of taxes under protest. A demurrer was sustained without leave to amend upon the ground that the State of California had not given its consent to be sued. The court, on page 422 of its opinion, points out that the law does not permit a legal right to exist without a remedy and, quoting from *Monongahela Bridge Company v. The United States*, 216 U. S. 177, 195, 30 S. Ct. 356, 54 L. Ed. 435, says:

“Suffice it to say that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.”

In the same case the court quotes from the Supreme Court of California at page 422:

“In any event this court is not powerless to formulate rules of procedure where justice demands it. Indeed it has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.”

In the case at bar, if the courts were powerless to prevent the 3-year period provided for in Section 542(b) of the Code of Civil Procedure from running during the period of time that the Riverside Iron and Steel Corporation took in connection with its appeal from the judgment in *Foley v. Riverside Iron and Steel Corporation*, it would be a simple matter, in many actions, to defeat the attachment simply by securing an order of court and depositing the fund with the Clerk *in custodia legis*.

The question of whether or not the period of time runs under a statute has been passed upon in varying circumstances in the State of California. The leading case is *Christian v. The Superior Court*, 9 Cal. 2d 526, 71 P. 2d 205. In this case a period of 5 years expired from the filing of the complaint and before the action was brought to trial. The governing statute, Section 583 of the Code of Civil Procedure, is mandatory in requiring dismissal of an action not brought to trial within 5 years from the filing thereof unless the parties have stipulated in writing to an extension. In the Christian case, a motion for a change of venue had been made and granted and an appeal was taken. After a reversal by the court holding that the order granting the change of venue was a void order, the defendant sought a dismissal of the action upon the ground that it had not been brought to trial within 5 years. The court denied the motion on the ground that the statute did not run during the time that it was impossible to try the action.

This case has been followed in California by many other cases involving not only Section 583, Code of Civil Procedure, but other statutes. In *Dillon v. Board of Pension Commissioners*, 18 Cal. 2d 427, 116 P. 2d 37,

the time for the filing of the action was suspended where the Board of Pension Commissioners had delayed in passing upon the claim.

In *Wells v. The California Tomato Juice Company*, 47 Cal. App. 2d 634, 118 P. 2d 916, the time to file for the foreclosure of a mechanic's lien was extended beyond the 90-day period where a petition in bankruptcy was pending and where the adjudication had not been made, the plaintiff not being permitted to file until the proceedings in the bankruptcy court had been pursued to a place where authority could be given.

In the *Estate of Morrison*, 125 Cal. App. 504, 14 P. 2d 102, a will contest had been dismissed as a result of fraudulent representation. Thereafter the dismissal was set aside and the contest reinstated. The court held that the period between the dismissal and the reinstatement could not be counted in determining whether or not the 5 years had run under Section 583 of the Code of Civil Procedure.

In *Byrnes v. The Massachusetts Bonding and Insurance Company*, 62 Cal. App. 2d 962, 146 P. 2d 24, the court had before it the limitation prescribed by Section 1487 of the Probate Code which provides:

“No action may be maintained against the sureties on a bond given by a guardian unless commenced within 3 years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring the action is under any legal disability to sue, the action may be commenced at any time within 3 years after the disability is removed.”

The question was raised in this case that the action had not been filed within the 3-year period. The bonding

company took the position that the only exception contained in the statute is where the ward "is under any legal disability to sue" and that this particular provision was not involved in the action. The court, on page 968, said:

"Although there is no case interpreting Section 1487 of the Probate Code on this question, there are many cases holding that such implied exceptions must or should be read into other statutes. One of the closest analogies is to be found in the cases interpreting Section 583 of the Code of Civil Procedure."

The court held that the time had not run.

See also:

Pacific Greyhound Lines v. Superior Court, 28 Cal. 2d 61, 168 P. 2d 665;

City of Pasadena v. The City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17;

Judson v. The Superior Court, 21 Cal. 2d 11, 129 P. 2d 361;

Bollinger v. The National Fire Insurance Company, 25 Cal. 2d 399, 154 P. 2d 399;

Westphall v. Westphall, 61 Cal. App. 2d 544, 143 P. 2d 405;

Ojeda v. The Municipal Court, 73 Cal. App. 2d 226, 166 P. 2d 49;

Anderson v. The City of San Diego, 118 Cal. App. 2d 726, 258 P. 2d 842;

Wilson v. Barry, 119 Cal. App. 2d 621, 259 P. 2d 991.

If the Money Was in Custodia Legis, Then the Writ of December 5, 1946, Remained in Full Force and Effect.

The appellant argues under point on Page 10 of his brief that the writ of attachment served on December 5, 1946, ceased to be effective after 3 years and cites in support of his position, *Loveland v. The Mining Company*, 76 Cal. 562, 564-565; *Hamilton v. Bell*, 123 Cal. 93, 95, to the point that a writ of attachment is purely a creature of statute. We make no point to the contrary, but as hereinbefore pointed out there are implied exceptions to the running of time under statutes. The mandatory injunction that a dismissal must be entered at the end of 5 years if the case has not been brought for trial is purely statutory. This mandate is a creature of the statute, yet the courts have written in and implied exceptions. The statute of limitations is a creature of statute and to this the courts have written in implied limitations. The rights given to employees under the various city charters creating pensions are rights created by statute. To these rights the courts have set forth implied exceptions. The compelling of one to foreclose a mechanic's lien within 90 days after filing is a creature of statute. To this there is an implied exception. The protection afforded the bonding company or the bondsman pursuant to Section 1487 of the Probate Code is a protection created solely by statute. To this the courts have written in an implied exception, and in the *Estate of Troy*, 1 Cal. App. 2d 732, the court invoked an implied exception to Section 542(b) of the Code of Civil Procedure.

**The Question of Whether the Writ of Attachment
Served on the County Clerk on August 12, 1948,
Was or Was Not Effective.**

If the property was *in custodia legis*, then of course the writ served August 12, 1948, served no purpose and created no lien. If the property was not *in custodia legis*, then that writ, was a valid writ and created a valid lien and the 3 years would not have expired until August 12, 1951.

We have pointed out above that the Clerk was enjoined from paying the money out until the judgment in *Foley v. Riverside Iron and Steel Corporation* became final, that this under the authorities stopped the running of the 3-year period under Section 542(b). If this is not true, then of course the writ of August 12, 1948, was good. Under either one of these alternatives, the lien on the fund existed long prior to the 4 months here involved.

Appellant pursues this argument further with the statement that the lien of the attachment or garnishment merges into the lien of the execution and is good for a period of only one year from the time of the service by the Sheriff of writ of execution, from this appellant argues that the lien of the garnishment merged into the lien of the execution issued on the 28th day of June, 1949, that the lien ceased to exist on the 28th day of June, 1950, some 5 months prior to the issuance of the execution of the 21st day of November, 1950.

Section 688 of the Code of Civil Procedure of the State of California sets forth what property is liable to

execution and it does not describe a cause of action or the proceeds of a cause of action in the hands of the Clerk. No point is made, as we understand it, by the appellant that a lien can attach to a cause of action or to the proceeds of a cause of action. Section 688.1 provides how a judgment creditor of a plaintiff in an action or special proceeding may get a lien on the proceeds of the judgment, and it is conceded here that no attempt was made to pursue this section obviously for the reason that the section is specifically limited to plaintiffs and in *Foley v. Riverside Iron and Steel Corporation*, Riverside Iron and Steel Corporation was a defendant and not within the contemplation of Section 688.1. Therefore, the execution issued on the 28th day of June, 1949, not being permissible by statute created no lien into which either one of the garnishments could merge. It follows from this that the argument that the garnishment merged into the lien of the execution and that the lien of the execution was good for one year only is of no moment in this proceeding.

Appellant cites at length *Durkin v. Durkin*, 133 Cal. App. 2d 283, 293-295, to the point that the lien of the attachment merged into the lien of the execution and that the lien of the execution remained in effect only one year from the date of service. In *Durkin v. Durkin*, *supra*, both the lien of the attachment and the lien of the execution expired prior to the deposit of the money into *custodia legis*, and therefore the point involved here was not involved there. Here the lien had not expired at the time of the deposit of the money into court.

The Appellant Is Making a Collateral Attack on the Order of the Superior Court of the State of California, in and for the County of Los Angeles Dated December 8, 1950, in the Action Foley v. Riverside Iron and Steel Corporation.

The appellant's argument that appellee obtained the funds in issue only as a result of the writ of execution issued on November 21, 1950, is without merit. The appellee obtained the funds pursuant to garnishment, writ of execution and order of the Superior Court. The order to show cause appears at pages 55 and 56 of the transcript. The court found as a fact that Harold J. Ostly, County Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, held funds subject to a writ of garnishment and subject to a writ of execution. The County Clerk found that LeRoy B. Lorenz, the assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt, had been served with the order to show cause, had defaulted, and that his default had been entered. The court, in order to make the order, had to have jurisdiction over all of the parties who had an interest in the fund. The affidavits filed in the action were used as evidence at the hearing and the finding was that Riverside Iron and Steel Corporation and Harlan H. Bradt were no longer interested in the fund. It belonged to their assignee, LeRoy B. Lorenz. The appellant here has no right to make a collateral attack on this order holding that his bankrupt had parted with title.

In *Lieberman v. The Superior Court*, 72 Cal. App. 18, the court on page 34 points out:

"Petitioners insist, concerning the rule to the effect that the pronouncements of courts of superior

or general jurisdiction are not subject to collateral attack unless the want of jurisdiction appears on the face of the record, that it has no application to orders, but relates only to judgments. This contention is without merit. 'The rule against the collateral impeachment of judgments applies generally to all varieties of judgments, decrees or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings' (34 C. J. p. 514). 'The rule against collateral attack applies to orders and judgments made by the courts in special proceedings taken before them, although not in the nature of contested actions, or purely *ex parte*, provided the matter involves a judicial determination and carries the sanction of the court's authority (34 C. J. 517).'

In the case at bar, we have two things: We have the assignment of the judgment by Riverside Iron and Steel Corporation and Harlan H. Bradt to LeRoy B. Lorenz. We have the order of the Superior Court dated December 8, 1950, in the case of Foley v. Riverside Iron and Steel Corporation and Harlan H. Bradt directing the Clerk to pay out of the fund deposited with him by Foley the moneys due Wood. Before the appellant may pursue his alleged cause of action, he must set aside the order and set aside the assignment.

Conclusion.

It is respectfully submitted that the writ of attachment served on December 5, 1946, remained effective until long after the judgment in Foley v. Riverside Iron and Steel Corporation, if the funds were held *in custodia legis*.

It is respectfully submitted that if the funds were not *in custodia legis*, that then the second writ of attach-

ment served upon the County Clerk was good and did not expire until long after the court made its order for payment by the County Clerk.

It is respectfully submitted that under the law of California, regardless of whether the funds were *in custodia legis* or not, they were not subject to execution prior to final judgment, and that therefore no lien was ever obtained into which the garnishments could merge.

It is respectfully submitted that before the appellant may pursue any remedy that he may have, he must first set aside the order of December 8, 1950, in the Superior Court and he must set aside the assignment of the proceeds of the judgment by Riverside Iron and Steel Corporation and Harlan H. Bradt to LeRoy B. Lorenz.

It is respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

CHARLES W. WOLFE,

THOMAS A. WOOD,

Attorneys for Appellee.



No. 15086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside
Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

APPELLANT'S REPLY BRIEF.

ALEX D. FRED and
LOUIS M. BROWN,

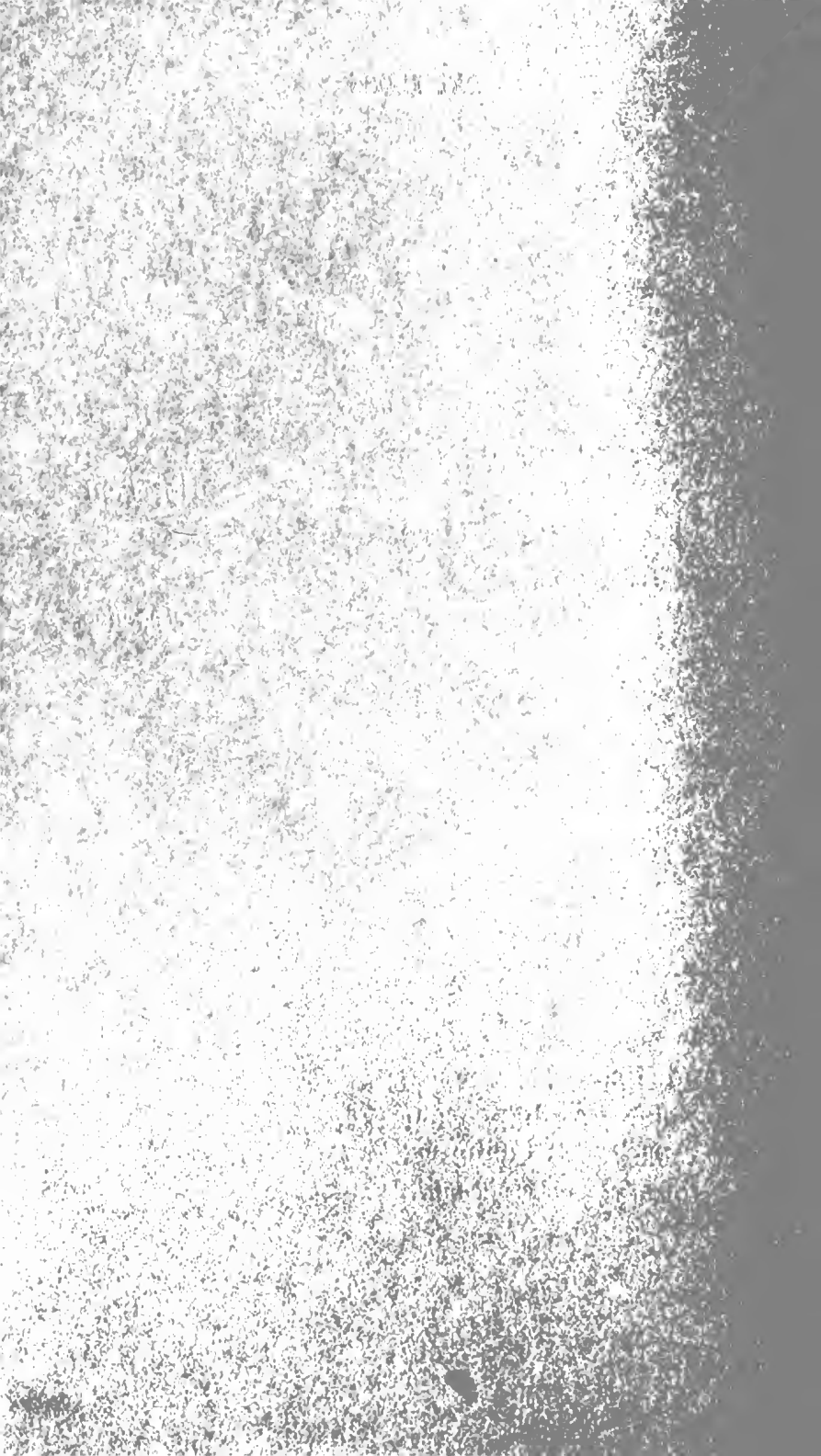
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APPELLANT'S REPLY BRIEF.

Preliminary Statement.

This reply brief is confined to answering the major arguments made by appellee in his reply brief. With respect to the other points discussed by appellee, appellant believes that his own opening brief presented the contrary arguments and authorities raising the issues involved on his appeal. He respectfully requests that the opening brief be referred to with reference to such points.

I.

There Is No Statutory Authority Permitting the Extension of an Attachment Lien on Personal Property Beyond the Three-year Period Provided for in Section 542b of the Code of Civil Procedure of California.

In his reply brief, appellee argues that the writ of attachment served on E. T. Foley on December 5, 1946,

continued to exist beyond the three-year period provided for the duration of a garnishment lien on personal property by Section 542b of the Code of Civil Procedure of California. (Appellee's Br. pp. 12-18.)

No express authority is cited by appellee for his contention. The only case involving an attachment upon which appellee relies is *Estate of Troy*, 1 Cal. App. 2d 732. This case is easily distinguishable from the instant one. In *Estate of Troy, supra*, the Court held that a statutory attachment of an interest of an heir in an estate remained valid and binding until final distribution even though such event occurred more than three years after the attachment. The Court, however, was careful to point out that: (1) it was only by virtue of the enactment of Section 561 of the Code of Civil Procedure that such interest of an heir was attachable; and (2) that the rights of an attaching creditor of an heir must be measured by Section 561 rather than Section 542b of the Code. The Court held, in part, at pages 735, 736:

" . . . Section 561 is a special statute dealing exclusively in the attachment of the interest of an heir or legatee in the personal property of an estate. It is the only authority under which the probate court may make distribution to one who is not an heir or legatee . . . Before this section was enacted personal property in the hands of an executor was deemed to be in the custody of the law and as such not subject to attachment or execution. This section provided a remedy where none had theretofore existed and it laid down the procedure for making the remedy effective . . . There are many authorities holding that, where a right existed at common law, a statutory remedy is merely cumulative, but that, where the right is given and the remedy is provided by statute, the statutory remedy must be pursued . . .

This respondent has strictly followed the remedy provided in the statute and we can see no reason why it should be denied the right because those over whom it had no control delayed the proceedings.”

See also *Estate of Bennett*, 13 Cal. 2d 354, 366 *et seq.*, where the Supreme Court recognized the special nature of Section 561 of the Code of Civil Procedure.

In the instant action there is no statutory authority, as was the case in *Estate of Troy*, permitting the lien, if any, acquired by the service on Mr. Foley to extend beyond the three-year statutory period provided for in Section 542b. On the contrary, it appears that the legislative intent is not to permit the duration of a garnishment or attachment lien on personal property to extend beyond the three-year period. Thus, the Legislature in Section 542a of the Code of Civil Procedure of California provided that an attachment lien on real property may be extended “for a period not exceeding two years” by following the procedure outlined in said section. It failed to make any similar provision concerning personal property. It is submitted that the absence of any similar statutory language pertaining to personal property, indicates a legislative intent not to permit a lien on such property to extend beyond the three-year period provided for in Section 542b.

Statutes pertaining to attachments or garnishments must be strictly construed, and, in any event, the courts are powerless to enlarge upon the rights granted by the statutes permitting the use of attachment processes.

In *Brun v. Evans*, 197 Cal. 439, the court states at page 443:

“ . . . Attachment liens are solely creatures of statute. They can be created and can continue to

exist only in the cases and to the extent to which the legislature by statutory enactment has authorized their creation and continued existence . . . Section 542a does not empower the court to create a lien where none exists, nor to revive a lien which has ceased to exist.”

See also:

Stowe v. Matson, 94 Cal. App. 2d 678, 683.

As stated in 5 *Cal. Jur.* 2d 598:

“. . . Proceedings by attachment or garnishment are creatures of statute. They have only the scope which the legislature has chosen to accord to them, and cannot be extended to cases not mentioned in the statute. A cardinal rule of the law of attachment and garnishment, therefore, is that the statutory provisions relating thereto must be strictly construed and followed.”

The other cases cited by appellee in support of his contention are not in point. They relate to procedural rules concerning the running of the statute of limitations, the time for dismissal of an action, or the filing of a claim, etc. These cases do not pertain to the creation or existence of a statutory right as is the case in the instant matter. It is submitted that the rights of an attaching creditor—in this case the appellee—must be measured by the statutes creating such right. Section 542b is not a statute of limitations but is a substantive part of the right created by the California attachment statutes.

To imply exceptions other than those expressly mentioned in the attaching statutes to the clear language of Section 542b, which states that an attachment lien on personal property shall “cease to be of any force or effect” after

three years, it is submitted, does violence to the legislative intent. It in effect would constitute a judicial amendment of the attaching statutes. No California court has gone this far and in fact the appellate decisions recognize that the courts are powerless to extend the operation of an attachment lien except as specifically permitted by statute.

Brun v. Evans, 197 Cal. 439, 443;

Palmer v. Fix, 205 Cal. 472;

Clark v. Superior Court, 37 Cal. App. 732.

II.

Appellee's Argument Demonstrates That the Findings of the District Court Are Inconsistent and Cannot Support the Judgment.

On pages 19 and 20 of his brief, appellee takes issue with appellant's argument that if, as found by the District Court, the deposit with the Clerk of the Superior Court of the money was not *in custodia legis*, it follows that the August 12, 1948 attachment writ must necessarily have merged with the writ of execution of June 28, 1949. Appellant cited as his authority the recent case of *Durkin v. Durkin*, 133 Cal. App. 2d 283, which had the effect of crystallizing the rule expressed earlier in *Jones v. Toland*, 117 Cal. App. 481, 483; *Puissegur v. Yarbrough*, 29 Cal. 2d 409, 412; and *Jones & Son v. Independence Ind. Co.*, 52 Cal. App. 2d 374, 378.

Appellee seeks to distinguish the *Durkin* case on the theory that there both the lien of attachment and execution "expired prior to the deposit of the money into *custodia legis*." However, in so doing he is now seeking to oppose—rather than uphold—the findings of fact in support of his judgment. As indicated in appellant's brief, the trial

court made specific findings that the deposit by Mr. Foley with the Superior Court Clerk did not have the effect of placing the money *in custodia legis*. [Tr. p. 57, par. 4.]

It is apparent from appellee's argument that he now seeks to avoid the findings of the District Court that (1) the money deposited by Foley was not *in custodia legis* and (2) that the writ of attachment of August 12, 1948 was valid. As pointed out in our opening brief, such findings are inconsistent with the finding by the District Court that the writ of execution of June 28, 1949 was not effective. The inconsistency of the trial court's findings have been recognized by appellee.

Appellee states that under Section 688 of the Code of Civil Procedure neither a cause of action nor the proceeds of a cause of action are subject to execution. Section 688, it should be noted, does not exclude the "proceeds of a cause of action" from execution as asserted by appellee. It states that "no cause of action nor judgment *as such*, shall be subject to levy or execution." (Our emphasis.) It also provides that among other things "all property and rights of property seized and held under attachment in the action, are liable to execution." In the instant action, the property which appellee has always claimed was the subject of the garnishments and executions was the money owed by Mr. Foley to Riverside. If this is so, execution would have been permissible under Section 688.

On the other hand, if in fact, it was the cause of action or claim of Riverside, appellee, contrary to his assertion,

could have obtained a lien on the proceeds by invoking Section 688.1 of the Code of Civil Procedure. Appellant asserts that this section is inapplicable because Riverside was not a “plaintiff” in the Foley action. It is obvious, though, that the word plaintiff is used in the section in the broad sense of a person having a claim against another. This is made clear by the later language of the section which provides that:

“Such judgment creditor shall have a lien to the extent of his judgment upon all moneys recovered by his judgment debtor in such action or proceeding”

The use of the word “plaintiff” in Section 688.1 is analogous to its use in Section 538 of the Code of Civil Procedure which provides that a “plaintiff” may obtain an attachment in certain instances. In *Aller v. Beverly Hills Laundry, Inc.*, 98 Cal. App. 580, 584, the court in construing the latter section held that “plaintiff” is “intended to mean the *claimant* or *moving party*; or, in other words, any party to the action seeking affirmative relief.” (Court’s emphasis.) It thus permitted a defendant who filed a counterclaim to obtain an attachment against the plaintiff. By a parity of reasoning, it is evident that the same construction would prevail in interpreting Code of Civil Procedure, Section 688.1; and that appellee could have obtained a lien on Riverside’s interest in the Foley judgment. It should be noted that the District Court did not find that Section 688.1 of the Code of Civil Procedure was not available to appellee; instead it found that “no effort was made to impress a lien upon said judgment, or said fund pursuant” to said section. [Tr. p. 57, par. 5.]

III.

Appellee Has Gone Outside the Stipulation of Facts to Support His Argument That Appellant's Action Constituted a Collateral Attack on the Order of the Superior Court.

In support of his position that the appellant trustee's action herein constitutes a collateral attack on the order of the Superior Court, appellee has gone beyond the stipulation of facts upon which this case was submitted. Contrary to his assertion on pages 21 and 22 of his brief, there is no finding by the Superior Court, in the Foley action, nor by the District Court in this proceedings, that Riverside was "no longer interested in the fund." The Superior Court order of December 8, 1950 shows that Riverside was never served with notice of the hearing. It also shows that the Clerk was ordered to make payment to the Sheriff pursuant to the writ of execution obtained by appellee "for the use and benefit of Riverside Iron & Steel and Harlan H. Bradt." [Tr. pp. 44-45.]

For the reasons stated in our opening brief, appellant relies on the December 8, 1950 order of the Superior Court in support of his contention that the payment to appellee of the money pursuant to such order constituted a preferential transfer under Section 60(a) of the Bankruptcy Act.

Conclusion.

Appellant sincerely believes that the judgment of the District Court is contrary to the applicable law. Appellant believes that the authorities cited in his brief demonstrate that the appellee had no lien on the money he received antedating the four-month period of bankruptcy. He again urges this court to reverse the judgment and remand the case for further proceedings.

Respectfully submitted,

ALEX D. FRED and

LOUIS M. BROWN,

By ALEX D. FRED,

Attorneys for Appellant.



No. 15,086

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside
Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

PETITION FOR REHEARING.

ALEXD. FRED and
LOUIS M. BROWN,

8692 Wilshire Boulevard,
Beverly Hills, California,

Attorneys for Appellant.

FILED

JUN 6 1957

PAUL P. O'BRIEN, CLERK



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No. 15,086
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LEWIS H. SAPER, as Trustee in Bankruptcy of Riverside
Iron & Steel Corporation,

Appellant,

vs.

THOMAS A. WOOD,

Appellee.

PETITION FOR REHEARING.

*To the Honorable Walter L. Pope, James Alger Fee,
and Stanley M. Barnes, Circuit Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant respectfully petitions this Honorable Court for a rehearing of the appeal in the above matter on the ground that the decision rendered by it on May 7, 1957, was based on a misconception of the facts and issues decided by the District Court.

This court rested its affirmance of the trial court judgment on the ground that Riverside Iron & Steel Corporation and Harlan H. Bradt (hereinafter respectively referred to as "Riverside" and "Bradt"), of whose estates Appellant is the Trustee, had "assigned all their right, title and interest in the fund deposited in court" in the *Foley* action to Leroy B. Lorenz prior to bankruptcy.

This was not an issue submitted or decided by the trial court, but was a matter reserved for future determination in the event that Appellant prevailed on the limited issues actually submitted by the parties and decided by the trial court.

As the record on appeal makes clear, the entire case was heard on a written stipulation of fact and amendment to stipulation, which are quoted in full in the District Court's findings. [Tr. pp. 37-56.]

At the time that the stipulation of fact and amendment to stipulation were filed with the District Court, Appellant and Appellee also signed and filed a written "Statement of Issues." The Statement of Issues reads as follows:

"THE COURT IS TO DETERMINE, BASED UPON THE FACTS AS STIPULATED TO:

I.

"Whether or not the money in the sum of \$5800.07, paid over to Thomas A. Wood in satisfaction of the judgment obtained by the said Thomas A. Wood against Riverside Iron and Steel Corporation, a corporation, was received by the said Thomas A. Wood as the result of a lien arising out of writs of attachment or garnishment or writ of execution obtained by the said Thomas A. Wood within four months before the date of the filing of the voluntary petition in bankruptcy by Riverside Iron and Steel Corporation, i. e., within four months before March 14, 1951.

II.

"Did Thomas A. Wood obtain a lien upon the funds ultimately paid to him by order of the Superior Court of the State of California, in and for the County of Los Angeles, as the result of writs of

attachment or garnishment served prior to November 14, 1950, and if so, did such lien remain valid and subsisting on December 21, 1950?

“Dated this 13th day of April, 1954.

“Thomas A. Wood (sgd)

(Thomas A. Wood)

Attorney for Defendant

LOUIS M. BROWN

ALEX DENNY FRED

By Alex D. Fred (sgd)

Attorneys for Plaintiff.”

Through error or accident Appellant failed to designate the above quoted “Statement of Issues” as part of the record to be transmitted on appeal. Appellant believes he inadvertently omitted it from the record on appeal because Appellant was under the impression that the findings and opinion of the District Court were clearly directed and confined only to the issues embodied in the “Statement of Issues.”

Appellant respectfully suggests that this Court exercise the power granted it by *Rule 75(h)* of the *Federal Rules of Civil Procedure** to include and consider the “Statement of Issues” as part of the record on appeal or, alternatively, to order it transmitted as a supplemental record. That this is a situation where the Court may properly

*Rule 75(h) provides in part: “. . . If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, *or the appellate court, on a proper suggestion or on its own initiative, may direct that the omission or misstatement shall be corrected*, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.” (Emphasis added.)

act in the interests of justice cannot be doubted. 7 Moore's *Federal Practice* (2d Ed.), Sec. 75.15(2), p. 3665, *et seq.*, citing *American Chemical Paint Co. v. Dow Chemical Co.* (6 Cir.), 164 F. 2d 208.

Appellant submits that the inclusion of the "Statement of Issues" as part of the record on appeal, will make it self-evident that this Court rested its affirmance of the trial court judgment on an erroneous premise.

It is significant that the District Court made no finding that Riverside or Bradt had assigned the moneys involved to Leroy B. Lorenz. This Court impliedly recognizes the absence of such finding in stating in the next to last paragraph of its opinion that the District Court "findings state a ground for the decision which is independent of the grounds for affirmance which have been set forth above."

A careful examination of the record, it is submitted, shows that there is no evidence upon which to support such a finding, if, in fact, one had been made. The only reference to Leroy B. Lorenz is found in paragraphs XII and XIII of the Stipulation of Fact [Tr. pp. 42-44] where Appellant and Appellee stipulated that certain orders had been made by the Superior Court; the orders were quoted verbatim. In the orders reference was made to "LeRoy B. Lorenz, assignee of the judgment in favor of Riverside Iron and Steel Corporation and Harlan H. Bradt." But a reading of the orders makes it clear that the words "assignee of the judgment" were *descriptio personae* only. They were not in any way or manner in-

tended to show the capacity or define the legal relationship between Lorenz and the bankrupts. See:

Goff v. Will County National Building Corporation (Ill.), 35 N. E. 2d 718, 720;

Hodgson v. Dorsey (Iowa), 298 N. W. 895, 897.

It is further submitted that the effect of the stipulation with reference to the above mentioned paragraphs, was to admit only that certain orders were made by the Superior Court of Los Angeles County, and not that Riverside had assigned its right and interest in the funds to Lorenz. In this connection it should be noted that the very order directing the Clerk to pay over the money involved to the Sheriff stated that it was to come from "*funds heretofore deposited . . . for the use and benefit of Riverside Iron and Steel Corporation, a corporation, and Harlan H. Bradt.*" [Tr. pp. 44-45.]

The issue of the assignment admittedly was raised by the answer of the appellee. But it was a matter about which neither party felt foreclosed from presenting evidence at the proper time. The only issues before the District Court was whether or not Appellee had a lien on the funds, and whether such lien predated the four month period prior to the bankruptcy of his judgment debtor, Riverside. As Judge Carter pointed out in his memorandum of decision:

"This case has been tried partially on the issue of whether Wood had a lien on the money. If the decision is in the affirmative, this disposes of the case. If not, then other issues as to insolvency of Riverside, etc. will have to be tried." [Tr. p. 24.]

Concededly, Appellant did not offer evidence with respect to the other elements required to show a preferential transfer under Section 60 of the *Bankruptcy Act*. But it is equally evident that these matters were reserved for future determination in the event Appellant prevailed on the question of whether Appellee obtained the money as a result of a lien acquired only within the four month period prior to the bankruptcy of Riverside. [Tr. pp. 48-49.] The District Court's decision against Appellant made the other issues of the case moot.

Sincere in the belief that the District Court erred as a matter of law on the issues actually before it, Appellant brought the instant appeal. In his opening and reply briefs on appeal, Appellant attempted to state the reasons and cite the decisions which he believes support his contention that the judgment should be reversed. The issues raised by Appellant's appeal were not passed upon by this Court because it rested its affirmance on other grounds. Appellant earnestly suggests that there consideration is necessary in order properly to determine the instant case.

Appellant urges that this Honorable Court grant the within petition for rehearing and reconsider its decision in the light of the foregoing discussion and on the basis of the issues raised in Appellant's briefs.

Respectfully submitted,

ALEX D. FRED, and

LOUIS M. BROWN,

By ALEX D. FRED,

Attorneys for Appellant.

Certificate of Counsel.

State of California, County of Los Angeles—ss.

ALEX D. FRED, being first duly sworn, deposes, certifies and says: that he is one of the attorneys for Appellant's in this action; that he makes this certificate in compliance with Rule 23 of the Rules of this Court; that in his judgment the foregoing petition for rehearing is well founded; and that the same has not been interposed for delay.

ALEX D. FRED.

Subscribed and sworn to before me this 5th day of June, 1957.

MARGARET H. FALES,

*Notary Public in and for the above
County and State.*

My Commission expires January 12, 1958.



No. 15087

United States
Court of Appeals
for the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California.
Northern Division.

FILED

MAY 10 1956



No. 15087

United States
Court of Appeals
for the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFORNIA,

Appellant,

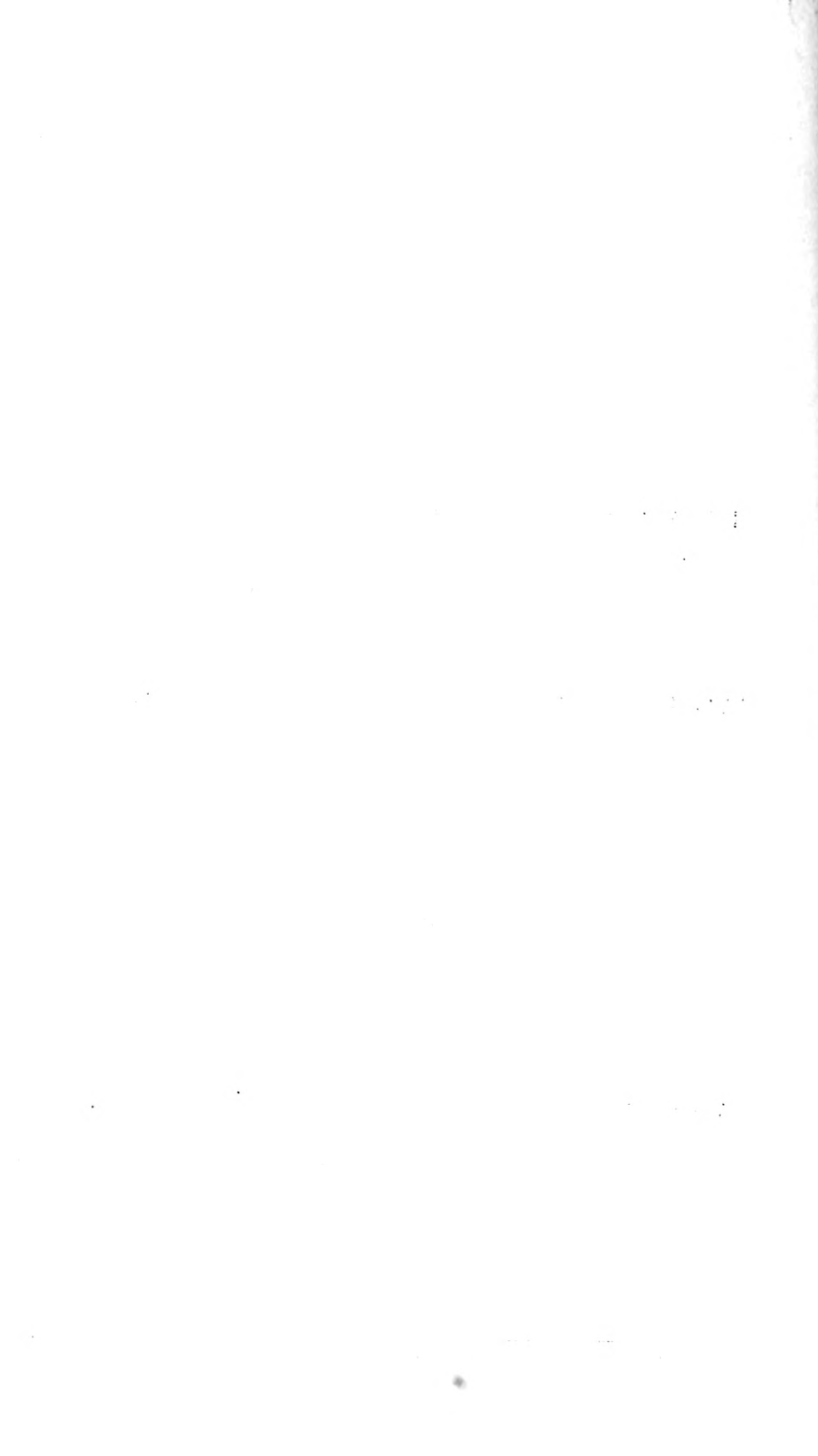
vs.

CALIFORNIA PACKING CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
Southern District of California, Northern
Division

No. C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Plaintiff,

vs.

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

Defendant.

MOTION TO DISSOLVE INJUNCTION

Comes now defendant, Sun-Maid Raisin Growers of California, and moves this court to dissolve the injunction dated June 15, 1936, and issued by the Honorable Paul J. McCormick, pursuant to a final decree of the same date. Copies of said injunction and decree are attached hereto as Exhibits A and B.

This motion is made on the ground that no justification now exists for continuation of the injunction and defendant will be unjustly damaged as long as said injunction is in effect.

Said injunction was based upon the ownership, by plaintiff, California Packing Corporation, of the trade-mark Sun-Kist and was issued for the purpose of protecting certain rights residing in plaintiff at the date of said injunction by virtue of the ownership and use by plaintiff of said trade-mark.

Since said injunction issued, the trade-mark Sun-Kist has been abandoned by Plaintiff, and any rights to the trade-mark Sun-Kist have been assigned or [2*] transferred by plaintiff and no longer reside in plaintiff.

An affidavit of Earle G. Granger, Secretary of plaintiff, Sun-Maid Raisin Growers of California, in support of this motion is attached.

December 14, 1954.

BOYKEN, MOHLER & WOOD,

By /s/ GORDON WOOD,

Attorneys for Defendant.

Certificates of Service by Mail attached. [3]

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

EXHIBIT A

In the United States District Court for the Southern District of California, Northern Division

In Equity No. C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Complainant,

vs.

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a Corporation,

Defendant.

WRIT OF INJUNCTION

United States of America,
Southern District of California—ss.

The President of the United States of America to
Sun-Maid Raisin Growers of California, Its
Agents and Servants, and All Claiming and
Holding Through or Under It, Greeting:

Whereas, California Packing Corporation has
filed on the equity side of the District Court of the
United States for the Southern District of California,
Northern Division, a bill of complaint against
Sun-Maid Raisin Growers of California, and has obtained
an allowance for an injunction as prayed for in said bill,

Now, Therefore, we having regard to the matters in
said bill contained, do hereby command and strictly

enjoin you, the said Sun-Maid Raisin Growers of California, your agents and servants, and all claiming and holding through or under you, from using the trade-mark "Sun-Maid" otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins (nothing herein contained shall enjoin or restrain you, the said Sun-Maid Raisin Growers of California, from using your present corporate name), which commands and injunctions you are respectively required to [6] observe and obey perpetually.

Whereof, fail not under penalty of the law thence ensuing.

Witness, the Honorable Paul J. McCormick, Judge of the District Court of the United States for the Southern District of California, this 15th day of June, 1936, and in the 160th year of the independence of the United States of America.

[Seal] /s/ R. S. ZIMMERMAN,
Clerk of the District Court of the United States
for the Southern District of California.

By EDMUND L. SMITH,
Deputy Clerk.

/s/ PILLSBURY, MADISON &
SUTRO,
Attorneys for Complainant.

EXHIBIT B

In the District Court of the United States for
the Southern District of California, Northern
Division

In Equity C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Complainant,

vs.

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

Defendant.

FINAL DECREE

The above-named California Packing Corpora-
tion, the complainant in the above-entitled cause,
having duly appealed to the United States Court of
Appeals for the Ninth Circuit from the final decree
made and entered herein on the 26th day of March,
1934, dismissing the bill of complaint; the said United
States Court of Appeals for the Ninth Circuit, having
duly heard the said appeal upon the transcript of
the record and having reversed the said decree of the
District Court of the United States for the Southern
District of California, Northern Division, with costs,
and having ordered, adjudged and decreed that said
complainant recover against said defendant \$337.54
for its costs in said United States Court of Appeals
for the Ninth Circuit and that it have execution

therefore; the said United States Court of Appeals for the Ninth Circuit having remanded the said cause to the said district court with instructions that this court take such further proceedings in conformity to the opinion and decree of said court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding, which order, decree, opinion and instructions appear to this court by the mandate of the said United States Court of Appeals for the Ninth Circuit. [4]

Now, Therefore, it is Ordered that said mandate be filed herein and spread upon the minutes of this court, and on reading and filing said mandate and in pursuance thereof,

It is Ordered, Adjudged and Decreed that this court, by virtue of the power and authority therein vested, and in obedience to the said mandate, doth order, adjudge and decree that the decree made and entered herein, dated March 26, 1934, be, and it is hereby, vacated and set aside; and

It is further Ordered, Adjudged and Decreed that an injunction issue herein perpetually enjoining and restraining the defendant, its agents and servants, and all claiming and holding through or under it, from using the trade-mark "Sun-Maid" otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, provided that such injunction shall not enjoin or restrain defendant from using its present corporate name; and

It is further Ordered, Adjudged and Decreed that complainant have execution for its costs of appeal in the amount of \$337.54, and that complainant take nothing in the way of damages against defendant but that complainant also recover its costs in this court taxed at \$158.55.

Dated: June 15th, 1936.

/s/ PAUL J. McCORMICK,
United States District Judge.

Approved as to form, as Provided in Rule 44:

/s/ E. S. ROGERS,
/s/ MILLER & BOYKEN,
Attorneys for Defendant. [5]

EXHIBIT C

(Transcript of Record, Exhibit 5, pp. 399-403)

This Agreement, made and entered into this 10th day of March, 1917, by and between California Associated Raisin Company, a corporation, party of the first part, and Griffin & Skelley Company, a corporation, party of the second part, and California Fruit Cannery's Association, a corporation, party of the third part,

Witnesseth

Whereas, the party of the first part and the party of the third part, on or about the 10th day of Sep-

tember, 1913, entered into certain agreements and leases in writing, which, except as modified by subsequent correspondence between said parties, are still in force and effect, and are hereby referred to and made a part of this agreement, and which it is understood and agreed between the said parties shall so continue in force and effect until September 15th, 1918; and

Whereas, the party of the first part and the party of the second part, on or about the 16th day of July, 1913, entered into certain agreements and leases, which, except as modified by subsequent correspondence and agreements between said parties, are still in force and effect, and are hereby referred to and made a part of this agreement, and which it is understood and agreed between the said parties shall so continue in force and effect until July 1st, 1918; and,

Whereas, since the execution of said contracts, the parties of the second and third parts, together with the J. K. Armsby Company, a corporation, have transferred and conveyed to the California Packing Corporation certain of their properties, including their facilities for packing and marketing raisins, both said parties of the second and third parts and said J. K. Armsby Company, however, retaining their respective corporate identities; and [8]

Whereas, there is now pending in the United States District Court for the Southern District of New York, a suit in equity entitled "The J. K.

Armsby Company, Complainant, vs. Ernest L. Heebner and Archibald C. Clark, Defendants," involving the right of the party of the first part to use the trade-mark "Sun-Maid" in connection with the manufacture and sale of raisins, the J. K. Armsby Company claiming that such use by the party of the first part of said trade-mark is detrimental to The J. K. Armsby Company in the sale of raisins and other products, in that the name "Sun-Maid" was and is mistaken for and confused with the trade-mark "Sunkist" owned by The J. K. Armsby Company and used by it in connection with the sale of raisins, dried fruits and canned goods; and,

Whereas, said trade-mark "Sunkist," and all of the right of said The J. K. Armsby Company to use the same, and all of the interest of said The J. K. Armsby Company in and to the suit pending as aforesaid, have been transferred and assigned to said California Packing Corporation; and,

Whereas, the party of the first part desires that its right to use the said trade-mark "Sun-Maid" in connection with the packing and sale of raisins and food products or confections containing raisins shall be established as against said The J. K. Armsby Company, or its successors, or any one claiming through or under them, the right to use said trade-mark "Sunkist," and to that end to procure the dismissal of said suit; and,

Whereas, the parties of the second and third parts desire to procure the consent of the party of the first part to the employment by the parties of the

second and third parts of said California Packing Corporation as their manufacturing and selling agents for the purpose of fully carrying out the [9] provisions of the contracts and leases hereinbefore referred to;

Now, Therefore, in consideration of the premises and of the procurement by the parties of the second and third parts of the dismissal of the said suit pending in the United States District Court, in and for the Southern District of New York entitled "The J. K. Armsby Company, Complainant, vs. Ernest L. Heebner and Archibald C. Clark, Defendants," and the procurement by said parties of the second and third parts of an agreement on the part of said California Packing Corporation and The J. K. Armsby Company, that no claim shall be made hereafter that the trade-mark of the party of the first part, "Sun-Maid," when used in connection with the packing and sale of raisins and food products or confections containing raisins interferes with the trade-mark "Sunkist" formerly owned by said The J. K. Armsby Company and now owned by said California Packing Corporation, the party of the first part has agreed, and does hereby agree, that the contracts and leases now in force and effect between it and the parties of the second and third parts, respectively as above recited, shall continue in full force and effect until the respective dates of termination thereof above stated, notwithstanding the transfer by the parties of the second and third parts, or either of them, of their manu-

facturing and selling facilities to the said California Packing Corporation; and the party of the first part agrees that the parties of the second and third parts may employ the said California Packing Corporation as their agent for the purpose of packing and selling raisins, and otherwise carrying out the covenants of said contracts on their parts respectively to be performed.

And the party of the first part further agrees, in [10] consideration of the dismissal of said suit and the agreement to be procured from said The J. K. Armsby Company and California Packing Corporation as aforesaid, concerning the use of said trade-mark "Sun-Maid," that it, the party of the first part, will use the said trade-mark "Sun-Maid" only on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins, and that said trade-mark when so used by the party of the first part shall always be accompanied by the name of the party of the first part, or the name "Associated Warehouse Company" as packer; provided however, that nothing herein contained shall be construed to limit the right of the party of the first part to sell or assign said trade-mark or to license other persons, firms, or corporations to use the same to the extent to which the party of the first part has the right to use the same under this agreement as against said The J. K. Armsby Company or said California Packing Corporation; and provided further, that nothing herein contained shall be construed to require said

The J. K. Armsby Company or California Packing Corporation to relinquish its use of the trade-mark "Sunkist" in connection with the packing and sale of raisins or other food products.

It is expressly understood and agreed that this agreement shall be of no force or effect until the parties of the second and third parts shall have procured and delivered to the party of the first part a copy of the order of court dismissing the action above referred to, duly certified by the clerk of the United States District Court, for the Southern District of New York, and shall also have procured from said The J. K. Armsby Company and California Packing Corporation the agreement concerning the use of said trade-mark "Sun-Maid" [11] above provided for; it being understood, however, that the approval of this agreement by said last-named corporations endorsed thereon shall be deemed to be a sufficient agreement on their part concerning the use of said trade-mark.

In Witness Whereof, the parties hereto, by their duly authorized officers, have executed this agreement and affixed hereto their respective corporate seals, the day and year first above written.

CALIFORNIA ASSOCIATED
RAISIN COMPANY,

By /s/ JAMES MADISON,
Vice-President,

By /s/ C. A. MURDOCH,
Secretary.

GRIFFIN & SKELLEY COM-
PANY,

By /s/ C. W. GRIFFIN.

CALIFORNIA FRUIT
CANNERS' ASSOCIATION,

By /s/ S. L. GOLDSTEIN,
Vice-President,

By /s/ CHAS. B. CARR,
Secretary.

For and in consideration of the execution of the foregoing agreement by California Associated Raisin Company, the undersigned California Packing Corporation and The J. K. Armsby Company do hereby approve and adopt the same as their agreement insofar as the same relates to the use by said California Associated Raisin Company of the trademark "Sun-Maid."

Dated: This 10th day of March, 1917.

CALIFORNIA PACKING COR-
PORATION,

By /s/ J. K. ARMSBY,
President.

THE J. K. ARSMBY COM-
PANY,

By /s/ J. G. NEWTON,
Vice-President.

[Endorsed]: Filed December 16, 1954. [12]

[Title of District Court and Cause.]

No. C-104-M

SUPPLEMENTAL AFFIDAVIT OF
EARLE G. GRANGER

State of California,
County of Fresno—ss.

Earle G. Granger, being duly sworn, deposes and says that he is Secretary of Sun-Maid Raisin Growers of California, defendant in the above-entitled case; that at the time of trial of said case he was Assistant Secretary of defendant corporation and has been associated with defendant corporation since that time; that he was present at said trial and is familiar with the circumstances surrounding the suit by plaintiff, California Packing Corporation, against defendant corporation and has been cognizant of, and bound by, the injunction issued in said case by the Honorable Paul J. McCormick on June 15, 1936; that said injunction was based upon ownership and use by plaintiff, California Packing Corporation, of the trade-mark Sun-Kist; that to the best of affiant's knowledge and belief, plaintiff has abandoned the use of the mark Sun-Kist and no longer uses the trade-mark Sun-Kist on either raisin or non-raisin food products, and affiant has been advised and believes that the trade-mark Sun-Kist is no longer the property of plaintiff corporation, having been assigned with [15] the good will of the business pertaining thereto, to Sunkist Growers of

Los Angeles, California, for approximately \$1,000,000; that affiant has advised Sunkist Growers of Los Angeles of defendant's desire to have said injunction dissolved and said Sunkist Growers of Los Angeles has informed affiant that the matter is one to be resolved between defendant and plaintiff, and that it desired neither to consent or object thereto; that, in the past, others have attempted, to the detriment of defendant, to use the word Sun-Maid or a colorable imitation thereof, on non-raisin food products; that similar instances of such unauthorized use of the name Sun-Maid are likely to occur in the future; that in affiant's opinion said injunction precludes defendants from taking all necessary preventive steps to stop such unauthorized use of defendant's name in the future.

[Seal] /s/ EARLE G. GRANGER,
Secretary.

Subscribed and sworn to before me this 18th day of January, 1955. Dorothy B. Landstrom, Notary Public in and for the County of Fresno, State of California.

[Endorsed]: Filed January 21, 1955. [16]

[Title of District Court and Cause.]

MEMORANDUM FOR ORDER

The decree here was entered pursuant to the Mandate of the Appellate Court and the Ninth Circuit has said that in such instance, "proper deference to its authority requires that a proceeding to reopen it, whether by rehearing or review, should first be referred to that tribunal." [Rogers v. Cons. Rock Products, (CCA 9, 1940) 114 F.2d 108, affirmed on other grounds 312 U.S. 510.] While that was a bankruptcy case, the authority cited for it was Simmons Company v. Grier Bros., 258 U.S. 82, 91, an injunction case which in turn cites other injunction cases.

Plaintiff's contention as to Rule 60(b) is disposed of adversely to them in *Butcher & Sherrerd v. Welsh*, (3 Cir. 1953) 206 F.2d 259, 262, Cert. den. 346 U.S. 925.

For the foregoing reasons the court does not act on the merits, but will direct a dismissal of the Motion for failure to comply with the above-mentioned requirements, upon presentation of a formal order to that effect. [13]

For benefit of counsel, the court wishes to observe the possibility that California Fruit Growers Exchange, as successor in interest of plaintiff, may be a necessary, or an indispensable party to any modification proceedings.

Dated: Los Angeles, California, this 20th day of January, 1956.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed January 20, 1956. [14]

In the District Court of the United States for the
Southern District of California, Northern Di-
vision

Civil Action No. C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Plaintiff,

vs.

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

Defendants.

ORDER DISMISSING DEFENDANT'S
MOTION TO DISSOLVE INJUNCTION

The defendant's motion to dissolve the injunction heretofore entered by this Court on June 15, 1936, pursuant to mandate of the United States Court of Appeals for the Ninth Circuit having been noticed for hearing and heard on January 31, 1955; the defendant appearing by Gordon Wood, Esq., [17] and Messrs. Boyken, Mohler & Wood, and the plaintiff appearing by James Michael, Esq., and Messrs. Pillsbury, Madison & Sutro; briefs having been

submitted on behalf of the respective parties, and the Court having heard the arguments of counsel and being fully advised; and the Court having heretofore entered its memorandum for order dismissing said motion on January 20, 1956:

It is hereby Ordered that defendant's motion to dismiss injunction be and hereby is dismissed without prejudice.

Dated: Jan. 30, 1956.

/s/ PEIRSON M. HALL,

Judge of the United States
District Court.

Approved as to form:

BOYKEN, MOHLER & WOOD,
GORDON WOOD,

By /s/ GORDON WOOD,
Attorneys for Defendant.

[Endorsed]: Filed January 30, 1956.

Docketed and entered January 31, 1956. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sun-Maid Raisin Growers of California, the above-named defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Dis-

missing Defendant's Motion to Dissolve Injunction entered in this action on January 31, 1956.

BOYKEN, MOHLER & WOOD,
GORDON WOOD,

By /s/ GORDON WOOD,
Attorneys for Defendant.

Dated: February 23, 1956.

[Endorsed]: Filed February 24, 1956. [19]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to California Packing Corporation, plaintiff, the sum of two hundred and fifty dollars (\$250.00).

The condition of this bond is that, whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal dated February 23, 1956, from the Order Dismissing Defendant's Motion to Dissolve Injunction entered January 31, 1956, if the defendant shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if defendant

fails to perform this condition, payment of the amount of this bond shall be due forthwith.

SUN-MAID RAISIN
GROWERS OF CALIFORNIA,

By /s/ GORDON WOOD.

[Seal] AMERICAN BONDING COM-
PANY,

By /s/ ERBON DELVENTHAL,
Attorney-in-Fact. [20]

State of California,
City and County of San Francisco—ss.

On this 23rd day of February, 1956, before me Belle Jordon, a Notary Public, in and for the City and County and State aforesaid, duly commissioned and sworn, personally appeared Erbon Delventhal, known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney-in-Fact of the American Bonding Company of Baltimore, and acknowledged to me that he subscribed the name of American Bonding Company of Baltimore thereto as Principal and his own name as Attorney-in-Fact.

/s/ BELLE JORDAN,
Notary Public in and for the State of California,
City and County of San Francisco.

My Commission Expires November 9, 1956.

[Endorsed]: Filed February 24, 1956. [21]

In the District Court of the United States, for the
Southern District of California, Northern Di-
vision

No. C-104-M

CALIFORNIA PACKING CORPORATION, a
Corporation,

Plaintiff,

vs.

SUN-MAID RAISIN GROWERS OF CALIFOR-
NIA, a Corporation,

Defendant.

DEPOSITION

Be It Remembered, that on Wednesday, the 12th
day of January, 1955, at 10:00 o'clock a.m., pur-
suant to the annexed Notice to Take Depositions
Upon Oral Examination, at the offices of Messrs.
Boyken, Mohler & Wood, 723 Crocker Building,
San Francisco, California, personally appeared be-
fore me, H. L. Fly, a notary public in and for the
City and County of San Francisco, State of Cali-
fornia,

CHARLES GRIFFIN, JR.

a witness called on behalf of the defendant herein.

Messrs. Pillsbury, Madison & Sutro, represented by
James Michael, Esquire, appeared as attorneys
for the plaintiff; and

Messrs. Boyken, Mohler & Wood, represented by
Gordon Wood, Esquire, appeared as attorneys
for the defendant.

(Deposition of Charles Griffin, Jr.)

The said witness having been by me first duly cautioned [1*] and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the said deposition be reported by H. L. Fly, a duly certified reporter and a disinterested person, and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Wood: You might let the record show that this deposition is being taken in accordance with Rule 26 of the Federal Rules of Civil Procedure. [2]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

CHARLES GRIFFIN, JR.

a witness called on behalf of the defendant herein, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination

By Mr. Wood:

Q. Would you state your name and residence, age and occupation?

A. Charles W. Griffin, Jr. Do you want the home address or business address?

Q. Home address.

A. 144 Woodland Way, Piedmont, California. Age, 53.

Q. What is your occupation?

A. Vice president, California Packing Corporation.

Q. Who is the president of your corporation?

A. Mr. Roy G. Lucks.

Q. Are you related to a C. W. Griffin?

A. My father.

Q. Was he an officer of the California Packing Corporation? A. He was.

Q. And prior to that time was he connected with the Armsby Corporation—is that the name?

A. No, he and his brother, Mr. Andrew Griffin, were the owners of the Griffin and Skelly Company.

Q. And what relationship is there between the Griffin and Skelly Company and the California Packing Corporation?

A. They were one of the four companies that

(Deposition of Charles Griffin, Jr.)

went together to form the California Packing Corporation in 1916.

Q. And what were the other companies? [3]

A. California Fruit Canners Association, Central California Canners or Canneries—I am not exactly sure—Central California Canners, I believe it was, and the J. K. Armsby Company.

Q. How long have you been with the California Packing Corporation? A. Since 1923.

Q. And how long have you been vice president?

A. Well, I feel a little embarrassed about this, to be perfectly frank, but I think it was 1947. I couldn't tell you exactly. I could get it for you.

Mr. Michael: If you require the accurate date, counsel, we will get it for you.

Mr. Wood: If it seems to be pertinent, we will go into it later.

Q. And prior to 1947 or thereabouts what position did you have with the company?

A. Well, actually I was in the Dry Fruit Buying Department.

Q. Are you familiar with the use by California Packing Corporation of the trade-mark Sunkist?

A. I think I am.

Q. By the way, is that name as used by California Packing Corporation hyphenated or is it one word? A. One word.

Q. Has it ever been used hyphenated?

A. Not to my knowledge.

Q. Could you tell me approximately when—may I refer to it as Cal Pac for short? A. Yes.

(Deposition of Charles Griffin, Jr.)

Q. Could you tell me when Cal Pac started to use the [4] trade-mark Sunkist?

A. I am sorry; I cannot. I actually don't know.

Q. Had the company used the trade-mark Sunkist for as long as you were associated with the company? A. Yes.

Q. And when were you first associated with the company? A. 1923.

Q. Could you tell me on what items the trade-mark was used by the company in the past?

A. Rather extensively in the canned fruit line and in the dried fruit line.

Q. And was it used on raisins? A. It was.

Q. Is the trade-mark Sunkist presently being used by Cal Pac? A. No, sir.

Q. When did they stop using that trade-mark?

A. I believe that the correct date is—I think it was 1950.

Mr. Michael: Counsel, I think you have a subpoena duces tecum served on the witness which called for an agreement respecting this matter, and if you care, I will submit it. I have both the original and the photostatic copy of the agreement dated September 20th, 1950, between California Packing Corporation and California Fruit Growers Association, and I think it is the document you are seeking under the subpoena duces tecum.

Mr. Wood: May I take a look at it?

(Mr. Michael hands documents to Mr. [5] Wood.)

(Deposition of Charles Griffin, Jr.)

Mr. Wood: Do you have the original of this document?

Mr. Michael: I have it here.

Mr. Wood: May I see it?

(Mr. Michael hands document to Mr. Wood.)

Mr. Wood: I didn't intend to get into this right now. I thought just a little later I might have a recess for ten or fifteen minutes so I could study this over if it is agreeable with you.

Mr. Michael: You suit yourself.

Q. (By Mr. Wood): This agreement is dated the 20th of September, 1950. Now, in answer to my previous question—would you read the last question?

(Question read.)

The Witness: May I say in answer to your question there that the agreement, as I understand it, was signed in 1950?

Q. (By Mr. Wood): What agreement is this you are referring to?

A. The agreement you have there.

Q. Perhaps we had better identify this agreement. Do you have a copy, or would you like to look at the original?

A. I have it.

Q. Would you tell me by whom it is executed?

A. By the California Packing Corporation, by Ralph Brown, the vice president, and by Mr. N. Y. Hollister as secretary; by the California Fruit Growers Exchange, H. A. Lynn——

Q. Are you acquainted with Mr. Lynn?

(Deposition of Charles Griffin, Jr.)

A. I am not, sir—and as secretary, Paul S. Armstrong. [6]

Q. Now, I am not acquainted with the contents of this agreement yet, but do I understand it to be that Cal Pac discontinued the use of the word “Sun-kist” about the time of the execution of this agreement? Is that correct?

A. Approximately so. There is a provision in the contract that would allow us to use any of the labels, cartons, boxes and so forth that we had in stock, using those Sunkist labels on any crops packed from the 1950 or prior crops—in other words, a provision to allow us to dispose of the stock of labels and boxes, cartons and so forth that we had on hand.

Q. Do you actually know how long it took to dispose of these? A. I do not, sir.

Q. Could you tell me, Mr. Griffin, that this agreement, dated September 20, 1950, was recorded in the patent office?

A. I cannot tell you, sir. I don't know.

Mr. Wood: Well, I really think at this point, if I may, I would like to take a recess for ten or fifteen minutes.

Mr. Michael: That's quite satisfactory.

(Recess taken.)

Mr. Wood: On the record.

Now, as I understand it, this original agreement comprises an authorization by the corporation that

(Deposition of Charles Griffin, Jr.)

Mr. Lynn be authorized to execute this agreement between California Packing Corporation and California Fruit Growers Exchange or Sunkist Growers of California. Is that correct?

Mr. Michael: I think it speaks for itself, [7] counsel.

Mr. Wood: Well, I want the record to show——

Mr. Michael: I will stipulate that attached to the agreement, dated September 20th, 1950, are copies of resolutions by the various corporations as certified to by the various secretaries or assistant secretaries showing that the parties who actually executed the document had authority to do so.

Mr. Wood: All right. Thank you.

Q. Now, Mr. Griffin, in this agreement Cal Pac is required to execute certain assignments of the trade-mark registrations on the mark Sunkist. Do you have these assignments with you?

A. I do not, sir.

Mr. Michael: I might say, counsel, as you see, Exhibit B attached to the agreement contains quite a long list of registrations. We didn't feel you were particularly interested in having copies of each of those. If there is any question about whether or not the documents called for were executed at some later time, we can check on that, and I will be glad to stipulate with you as to what the facts are.

Q. (By Mr. Wood): Preliminarily, I would like to know, was there just one main assignment that listed all these registrations listed in Exhibit B or was there an assignment for each registration?

(Deposition of Charles Griffin, Jr.)

A. I am sorry. I am not familiar with it.

Q. And you are not familiar with whether or not the assignments, if any, were recorded in the patent office?

A. I am not.

Q. Who would know?

A. Probably the secretary of the [8] corporation down there would know.

Q. The secretary of the corporation?

A. Yes.

Q. And who is the secretary?

A. At the present time Mr. Croce.

Mr. Michael: Off the record, counsel.

(Unreported discussion.)

Mr. Wood: On the record.

Q. Now, Mr. Griffin, this agreement specifies a certain consideration of money payable by Exchange—that is, the California Fruit Growers Exchange. Could you tell me whether or not that consideration has been paid?

A. To the best of my knowledge it has been completely paid.

Q. Now, also in the agreement Cal Pac, as I understand it, is permitted or may be permitted—the agreement may be construed so as to permit Cal Pac to continue to use a trade-mark which includes the word “Sun.” To the best of your knowledge, is Cal Pac employing a trade-mark at this time which includes the word “Sun”?

Mr. Michael: May I make an objection to the form of the question? I think it assumes construction of the agreement that may or may not be cor-

(Deposition of Charles Griffin, Jr.)

the case of California Packing Corporation versus
Sun-Maid Raisin Growers of California?

The Witness: Off the record.

(Unreported discussion.)

Mr. Wood: On the record.

The date of the trial was a short time prior to
1936.

Mr. Michael: If you don't know, you don't know.
Don't try to guess as to who might have some knowl-
edge about the trial.

The Witness: Frankly, I just don't know. [11]

Q. (By Mr. Wood): How about this secretary
you mentioned; what was his name?

A. Croce.

Q. And how long had he been secretary?

A. I believe it was about four years.

Q. Who was secretary prior to him?

A. Mr. Hollister. Mr. Hollister is dead.

Q. Getting back again to the use of the Sunkist
trade-mark prior to the Sunkist agreement, was
your use of the trade-mark domestic; in other words,
were products sold in the United States bearing the
trade-mark Sunkist? A. They were.

Q. Were they sold in foreign commerce, too?

A. They were.

Q. Was the foreign commerce involving the
trade-mark Sunkist a large percentage or small
percentage of the total use?

A. I couldn't answer that. I don't know.

Q. Who would be familiar with that?

(Deposition of Charles Griffin, Jr.)

A. Well, I assume that possibly that could be obtained from Mr. Croce.

Q. Prior to his assuming the office of secretary, what position did he have with the company?

A. He was with our Tax Department.

Mr. Wood: By the way, if I haven't done so, I want to introduce in evidence this copy of the agreement of September 20th, 1950; and it has been stipulated that a photostatic copy of the same may be employed and that said copy is an exact copy of the original agreement?

Mr. Michael: I will so stipulate. [12]

When you say you want to introduce it in evidence, what you mean, you want to have it marked and that you intend to offer it.

Mr. Wood: I want to offer it in evidence as our Exhibit 1.

Mr. Michael: I take it we have the usual stipulations as to the objections, and so forth. Therefore, it is not necessary for me to note my objection to the offer at this time.

Mr. Wood: You may object or not as you wish.

Mr. Michael: Well, if we do not have such a stipulation, I will object to the offer of the document at this time on the ground that it is incompetent, irrelevant and immaterial as far as the issues in this proceeding are concerned.

Mr. Wood: Isn't it true, counsel, we have stipulated that the photostatic copy which you have is a true copy of the original agreement?

Mr. Michael: I am perfectly willing to stipulate

(Deposition of Charles Griffin, Jr.)

that the photostatic copy is a true and correct copy of the original, and it may be reproduced and copies attached to the deposition, and any one of the photostatic copies may be used in the same manner that the original may be used at the hearing.

(Agreement above referred to marked Defendant's Exhibit No. 1.)

Mr. Wood: Counsel, are you going to be able to leave us another copy of this agreement? The reporter is going to take this one. I am going to give you back the original.

Mr. Michael: This is a negative copy, and the reporter [13] can have positive copies made and attach copies to the copies of the deposition.

Mr. Wood: How long would it take, Mr. Reporter, to get this back?

The Reporter: One day.

Q. (By Mr. Wood): Mr. Griffin, we are interested in getting some information on the extent of use by your company of the trade-mark Sunkist prior to the Sunkist agreement, and as you have testified you are not too familiar with the exact use, and as I understand your testimony, Mr. Croce would probably be familiar with such use?

A. I would assume.

Mr. Wood: I am wondering if Mr. Croce would be available to testify today?

The Witness: I doubt that now. He has been away; he handled some of these tax matters for

(Deposition of Charles Griffin, Jr.)

us, and whether he is there or not, I haven't the slightest idea.

Mr. Wood: I am wondering, counsel, whether you could agree to produce Mr. Croce within the next few days?

Mr. Michael: I am not prepared to enter into any stipulation right at the moment to produce any witness, counsel; and I don't say that for any reason of trying to harass or delay your preparation of your case here, but I simply don't know what the availability of these people is. If you are only interested in getting the statistics as to the use of the trade-mark, it seems to me you might approach that by a simpler avenue. You tell me what you want and I will get it for you. [14]

Mr. Wood: That sounds all right, and if it appears it would be better to have the testimony of someone who knows the situation, then we can go through the same thing again and get it. It just seemed to me that if Mr. Croce were available today we would like to have him here. We would naturally like figures on the amount of goods sold under the Sunkist trade-mark prior to the agreement of 1950.

Mr. Michael: In terms of percentage of the business of Cal Pac?

Mr. Wood: I think probably in terms of percentage and also in terms maybe of the gross amount of sales.

Mr. Michael: I am not sure that we will be willing to give you the latter. We might be willing to

(Deposition of Charles Griffin, Jr.)

give you the former; but let me explore the matter and I will let you know.

Mr. Wood: That's agreeable.

Mr. Michael: You are interested in what was in existence prior to the execution of this agreement?

Mr. Wood: Let's say five or ten years prior to the execution of the agreement, and I take it Mr. Croce could testify to that, despite the fact he has only been secretary for only five years.

Mr. Michael: I am not even sure if he is the witness that would have that information. I am not saying this critically of Mr. Griffin. He may be assuming that Mr. Croce, because he is secretary and has charge of the records, would be able to locate it. [15]

The Witness: He would have to dig up the information, but it's a question of who would present it. That's the reason I said Mr. Croce.

Mr. Michael: Do you want all this on the record?

Mr. Wood: Yes. We might go off the record now, if we may.

(Unreported discussion.)

Mr. Wood: On the record.

I think that is about all, and I certainly appreciate your coming up, Mr. Griffin.

/s/ CHARLES W. GRIFFIN, JR.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on the 12th day of January, 1955, at 10:00 o'clock a.m., before me, H. L. Fly, a notary public in and for the City and County of San Francisco, State of California, at the offices of Messrs. Boyken, Mohler & Wood, 723 Crocker Building, San Francisco, California, personally appeared, pursuant to the annexed Notice to Take Depositions Upon Oral Examination, Charles Griffin, Jr., a witness called on behalf of the defendant herein; and Messrs. Pillsbury, Madison & Sutro, represented by James Michael, Esquire, appeared as attorneys for the plaintiff; and Messrs. Boyken, Mohler & Wood, represented by Gordon Wood, Esquire, appeared as attorneys for the defendant; and the said Charles Griffin, Jr., being by me first duly cautioned and sworn to testify the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded by me, a duly certified and disinterested shorthand reporter, and was transcribed by me.

And I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him; and that the

deposition is a true record of the testimony given by said witness.

And I further certify that the exhibit hereto attached and [17] marked Defendant's Exhibit No. 1 is the exhibit referred to and used in connection with the deposition of said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 3rd day of February, A.D. 1955.

[Seal] /s/ H. L. FLY,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Oct. 13, 1956. [18]

DEFENDANT'S EXHIBIT No. 1

Resolved that Ralph Brown, the senior vice president, and N. A. Hollister, the secretary of this corporation, be and each of them is hereby authorized and directed to execute and attest on behalf of this corporation and in its name the form of agreement attached hereto between this corporation and California Fruit Growers Exchange.

I hereby certify that the above is a full, true, and correct copy of the resolution passed by the Executive Committee of the Board of Directors of California Packing Corporation at its meeting on Monday, September 18, 1950, and the same is in full force and effect and has not been revoked.

I further certify that the bylaws of said California Packing Corporation expressly provide that during the intervals between the meetings of the Board of Directors of said corporation, said Executive Committee of the Board of Directors shall possess and may exercise all the powers of said Board of Directors in the management and direction of the operations of said corporation.

In Witness Whereof I have hereunto set my hand and affixed the seal of this corporation this 18th day of September, 1950.

/s/ N. A. HOLLISTER,
Secretary.

Resolved, that H. A. Lynn the president, and Paul S. Armstrong the secretary of this corporation, be and each of them is hereby authorized and directed to execute and attest on behalf of this corporation and in its name the form of agreement attached hereto between this corporation and California Packing Corporation.

I hereby Certify that the above is a full, true and correct copy of the resolution duly passed by the board of directors of California Fruit Growers Exchange at a regular meeting thereof duly and regularly convened and held on Wednesday, September 20, 1950, and that the said resolution is in full force and effect and has not been revoked.

It Witness Whereof, I have hereunto set my hand and affixed the seal of this corporation this 20th day of September, 1950.

[Seal] /s/ PAUL S. ARMSTRONG,
Secretary.

This Agreement, dated this 20th day of September, 1950, by and between California Packing Corporation, a New York corporation, with its principal office and place of business in the City and County of San Francisco, State of California, hereinafter referred to as "Calpack," and California Fruit Growers Exchange, a California corporation, with its principal office and place of business in the City of Los Angeles, State of California, hereinafter referred to as "Exchange";

Witnesseth:

Recitals

(a) Whereas there is now in effect between the parties a written agreement dated October 7, 1915, a copy of which, marked "Exhibit A," is attached hereto and by reference incorporated as a part hereof, which relates to the ownership by Calpack of the trade-mark "Sun-Kist" with respect to certain products and the ownership by Exchange of the trade-mark "Sunkist" for certain other products; and

(b) Whereas it is the desire of the parties hereto that said written agreement Exhibit A be forthwith terminated; and

(c) Whereas Calpack has agreed to sell, transfer and assign all its right, title and interest in and to said trade-mark "Sun-Kist," together with that part of the good will of the business of Calpack connected with the use of and symbolized by the mark, but not the good will connected with the use of and symbolized by any other trade-mark used in its business, and all domestic and foreign registrations relating to said trade-mark, a list of such registrations being attached hereto marked "Exhibit B" and by reference incorporated as a part hereof, and Exchange has agreed to purchase the same:

Now, Therefore, in consideration of the premises and the mutual promises of the parties hereinafter set forth, the parties agree as follows:

1. Calpack hereby sells, assigns and transfers to Exchange its entire right, title and interest in and to the trade-mark "Sun-Kist" and registrations thereof, together with that part of the good will of the business of Calpack connected with the use of and symbolized by the mark, but not the good will connected with the use of and symbolized by any other trade-mark used in its business. In effectuation of this sale, assignment and transfer, Calpack hereby agrees to make, execute and deliver an assignment in the form attached hereto and marked "Exhibit C," and such other individual assignments, in substantially the same form, as may be requested by Exchange, with such formal changes as may be required by the laws or regulations of the jurisdiction in which such assignment is to be recorded, transferring to Exchange each and every registration of the trade-mark "Sun-Kist," state, federal and foreign, in which Calpack has or purports to have an interest, including, but without limitation to, each and every of the registrations listed in the aforesaid Exhibit B. Said assignments shall be in proper form for recordation in the respective countries issuing said registration in accordance with the respective laws of said countries.

All of the aforesaid shall be done at the sole cost and expense of Calpack and without cost or expense to Exchange.

2. Calpack covenants and agrees that from and after the date hereof, except as in this Article 2 permitted, it will not in any way or manner use the

trade-mark "Sun-Kist" or any colorable imitation thereof, or any trade-mark incorporating the word "Kist" or any combination thereof, or any similar word, or any illustration having such implication, or any representation, in part or in whole, of a sunburst, in connection with the sale or distribution of any product, or in or upon any carton, box label, circular, advertisement, sign, billhead or letterhead, or in any slogan.

Exchange agrees that Calpack shall have such time as may be necessary within which to complete the distribution of its products labeled, or to be labeled, under the "Sun-Kist" mark, packed from the 1950 or prior crops.

3. Calpack covenants and agrees that it will at any time subsequent to the date hereof, on request of Exchange or its duly authorized agent, deliver to Exchange up to fifty (50) copies of each and every available carton, box, label, circular, advertisement, sign, billhead, letterhead and slogan on which appears the trade-mark "Sun-Kist" or the word "Kist" or any combination thereof, or any illustration having such implication, or any representation, in part or in whole, of a sunburst.

Calpack further covenants and agrees that it will at any time after January 1, 1951, on demand of Exchange or its duly authorized agent, deliver to Exchange or destroy, as may be directed by Exchange or its duly authorized agent, all cartons, boxes, labels, circulars, advertisements, signs, billheads, letterheads, plates or any other material on which

appears the trade-mark "Sun-Kist" or any colorable imitation thereof, or any trade-mark, or slogan incorporating the word "Kist" or any combination thereof, or any similar word, or any illustration having such implication, or any representation, in part or in whole, of a sunburst, except the goods referred to in the second paragraph of Article 2 hereof.

All of the aforesaid shall be without cost or expense to Exchange.

4. Calpack covenants and agrees that it will, at any and all times, upon the request of Exchange or its duly authorized agent, promptly deliver to Exchange the originals or, at Calpack's option, duly authenticated copies of all letters, correspondence, documents and agreements of every kind and character relating to the adoption of the trade-mark "Sun-Kist" and relating to all controversies and proceedings with others respecting the use of the trade-mark "Sun-Kist" or any colorable imitation thereof, or any trade-mark incorporating the word "Kist" or any combination thereof.

Calpack further covenants and agrees that it will, upon the request of Exchange or its duly authorized agent, promptly deliver to Exchange for its use each and every of its files respecting each and every suit, opposition or interference in which the trade-mark "Sun-Kist" was in any way involved or concerned, and each and every of its files with respect to each and every registration and application for registration of the trade-mark "Sun-Kist," and each

and every of its files respecting any abandonment by Calpack of or any failure to renew any registration of "Sun-Kist," or any cancellation proceedings respecting the same, and each and every of its files respecting the adoption and use of the trade-mark "Sun-Kist" or of any trade-mark or slogan in which the word "Kist" or any similar word or words, or illustrations having such implication, or any representation, in part or in whole, of a sun-burst appears.

All of the same is to be furnished without cost or expense to Exchange.

5. Calpack covenants and agrees that it will, at the request of Exchange or its duly authorized agent, produce for use by Exchange all evidence and facts known, or which may become known to it relating to the adoption and use by Calpack and its predecessor of the trade-mark "Sun-Kist," and will produce such of its employees having knowledge of the facts, or having the custody or control of any evidence concerning the said adoption and use of the trade-mark "Sun-Kist," to testify respecting such facts in each and every interference and opposition and in each and every suit and proceeding in which said trade-mark "Sun-Kist" may now be or become involved or concerned.

All of the aforesaid to be done without cost or expense to Exchange other than reasonable cost of travel, hotel and subsistence incurred by any employee of Calpack requested by Exchange.

6. Nothing herein contained shall in anywise be construed as a guarantee or warranty on the part of Calpack as to the validity of its trade-mark "Sun-Kist" or the registrations therefor or as requiring Calpack to transfer or convey any physical assets.

7. The said agreement of October 7, 1915, is hereby terminated, cancelled and of no further force or effect.

Each of the parties hereto does, for itself and for its successors and assigns, remise, release and forever discharge the other, its successors and assigns, and any and all of the officers, directors, agents, attorneys and employees, or any one of them, of and from all claims of every kind, nature and character whatsoever against the other arising directly or indirectly out of or connected with said agreement dated October 7, 1915.

8. Exchange covenants and agrees to pay Calpack the sum of one million two hundred fifty thousand dollars (\$1,250,000) in the following installments:

Two hundred fifty thousand dollars (\$250,000) on or before November 1, 1950;

Two hundred fifty thousand dollars (\$250,000) on November 1, 1951;

Two hundred fifty thousand dollars (\$250,000) on November 1, 1952;

Two hundred fifty thousand dollars (\$250,000) on November 1, 1953; and

Two hundred fifty thousand dollars (\$250,000) on November 1, 1954;

as and for the full purchase price and compensation for said trade-mark and the rights hereunder conferred and the termination of the agreement of October 7, 1915, and all of the conditions, rights and obligations of this agreement.

Deferred payments are not to bear interest.

In Witness Whereof, the parties hereto have duly executed this agreement by their respective officers thereunto authorized as of the day and year first hereinabove written.

[Seal]

CALIFORNIA PACKING
CORPORATION,

By /s/ RALPH BROWN,
Vice President.

Attest:

/s/ N. A. HOLLISTER,
Secretary.

CALIFORNIA FRUIT
GROWERS EXCHANGE,

By /s/ H. A. LYNN,
President.

Attest:

/s/ PAUL S. ARMSTRONG,
Secretary.

Exhibit A

Whereas, The J. K. Armsby Company, a corporation of the State of Illinois, has used "Sun-Kist" as its trade-mark in connection with goods of the class hereinafter referred to as "groceries," comprising dried fruits, raisins, canned goods and many other articles sold by wholesale grocery houses, but not perishable fresh fruit or citrus fruit by-products; and said Company has registered its said trade-mark in the United States Patent Office in connection with many of the goods upon which it has used the same as aforesaid;

And Whereas, the California Fruit Growers Exchange, a corporation of the State of California, has used "Sunkist" as its trade-mark in connection with perishable fresh fruit, and particularly citrus fruit, and registered the same in the United States Patent Office as its trade-mark for many of the goods aforesaid in connection with which it has used the same;

And Whereas, in connection with the application upon which registration was made by the California Fruit Growers Exchange the Commissioner of Patents decided in substance that no interference existed between the uses or registrations of the mark aforesaid and it now appears that for several years the uses of "Sunkist" aforesaid have both continued on a very extensive scale, embracing very large distribution, accompanied by very large expenditures by both parties in popularizing their respective goods without material conflict or misconception and with the result that when used in con-

nection with groceries "Sun-Kist" in fact now indicates in the trade and to the public that the goods are the goods of The J. K. Armsby Company and when used in connection with perishable fresh fruit "Sunkist" now indicates in the trade and to the public the goods of the Exchange;

And Whereas, the parties hereto desire to record their understanding and agreement concerning the uses of said trade-mark with a view to avoiding any and all differences or conflict.

Now, Therefore, This Memorandum Witnesseth, that The J. K. Armsby Company and the California Fruit Growers Exchange recognizing the facts aforesaid have agreed and hereby agree as follows:

1. The California Fruit Growers Exchange recognizes the exclusive right of The J. K. Armsby Company to use its said trade-mark "Sun-Kist" on dried fruits, raisins, canned goods and other articles ordinarily sold by wholesale grocery houses, but not upon perishable fresh fruit or the by-products of citrus fruits.

2. The J. K. Armsby Company recognizes the exclusive right of the California Fruit Growers Exchange to use its said trade-mark "Sunkist" on oranges, lemons, grapefruit and all other perishable fresh fruit and upon citrus fruit by-products.

3. The J. K. Armsby Company and California Fruit Growers Exchange will continue to use "Sun-kist" only upon the highest grade and quality of their respective goods and each will endeavor by lawful means to prevent the use of "Sunkist" in

connection with goods of low grade or inferior quality, although the goods may not be identical in kind with the respective goods of the parties hereto, if the goods are of a kind such that confusion may arise concerning their origin, so as to impair the value of "Sunkist" as a trade-mark to either The J. K. Armsby Company or the California Fruit Growers Exchange.

It is understood and agreed that the provisions hereof shall be applicable to and govern the rights and acts of the parties in all markets and countries into which their goods are or may be shipped.

In Witness Whereof, each of said corporations has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed by its President and Secretary thereunto duly authorized, all done as of this 7th day of October, 1915.

THE J. K. ARMSBY

COMPANY,

(A Corporation),

By J. K. ARMSBY,

Its President,

By E. R. ARMSBY,

Its Secretary.

CALIFORNIA FRUIT

GROWERS EXCHANGE,

(A Corporation),

By F. Q. STORY,

Its President,

By H. VAN VLECK,

Its Asst. Secretary.

EXHIBIT B

Country	Reg. No.	Date	Expires
*U. S. Trade Mark Registration			
"	67,277	Jan. 28, 1908	Jan. 28, 1948
"	67,278	Jan. 28, 1908	Jan. 28, 1968
"	67,478	Feb. 4, 1908	Feb. 4, 1948
"	96,082	April 7, 1914	April 7, 1954
"	96,385	April 21, 1914	April 21, 1954
"	96,770	May 5, 1914	May 5, 1954
"	96,929	May 12, 1914	May 12, 1954
"	99,835	Sept. 22, 1914	Sept. 22, 1954
"	101,121	Nov. 17, 1914	Nov. 17, 1954
"	101,439	Dec. 15, 1914	Dec. 15, 1954
"	102,354	Feb. 9, 1915	Feb. 9, 1955
"	104,684	June 8, 1915	June 8, 1955
"	113,219	Oct. 10, 1916	Oct. 10, 1956
"	114,322	Dec. 12, 1916	Dec. 12, 1956
"	281,093	March 10, 1931	March 10, 1951
"	281,094	March 10, 1931	March 10, 1951
"	301,278	Feb. 21, 1933	Feb. 21, 1953
"	304,659	July 11, 1933	July 11, 1953
**U. S. Label Reg.			
"	16,770	Feb. 4, 1913	
**	16,771	Feb. 4, 1913	

**	"	16,772	Feb.	4, 1913	
**	"	16,773	Feb.	4, 1913	
**	"	16,774	Feb.	4, 1913	
**	"	16,775	Feb.	4, 1913	
**	"	16,776	Feb.	4, 1913	
**	"	16,777	Feb.	4, 1913	
**	"	16,778	Feb.	4, 1913	
**	"	16,779	Feb.	4, 1913	
**	"	16,780	Feb.	4, 1913	
**	"	16,896	April	1, 1913	
**	"	16,897	April	1, 1913	
**	"	17,715	May	26, 1914	
**	"	17,751	June	2, 1914	
**	"	17,752	June	2, 1914	
**	"	17,753	June	2, 1914	
**	"	17,754	June	2, 1914	
**	"	5,047	May	9, 1911	
	California State Registration	5,553	April	27, 1912	
	"	6,003	March	5, 1913	
	Foreign Registrations				
	*Argentine	92,212	Sept.	21, 1925	Sept. 21, 1935
	Australia	15,338	July	23, 1913	July 23, 1955
	Austria	55,518	March	6, 1913	Being reinstated
	Barbados	130	June	4, 1919	Unlimited

Country	Reg. No.	Date	Expires
Belgium (Renewal of No. 18,145)	46,240	Oct. 3, 1913	Unlimited
*Bolivia (Renewal of No. C-129)	A-675	June 26, 1919	June 23, 1939
***Burma	397/19	May 2, 1919	Unlimited
*Brazil (Renewal of No. 4,349)	29,040	Nov. 9, 1914	Feb. 24, 1945
*Canada	79/19518	March 23, 1914	March 23, 1939
"	78/19184	Dec. 15, 1913	Dec. 15, 1953or
"	90/21862	July 5, 1916	Dec. 15, 1963
"	184/40661	July 5, 1916	July 5, 1956or
*Ceylon	2,034	Oct. 2, 1926	July 5, 1966
*Chile	37,911	Nov. 4, 1919	Oct. 2, 1951
*	37,912	June 11, 1926	April 29, 1933
*China (Hong Kong)	120/1919	June 11, 1926	June 11, 1936
China (Nanking)	13,123	Aug. 20, 1919	June 11, 1936
China (Manchuria)	12	Oct. 30, 1930	April 15, 1933
China (Shanghai)	C.H. 15,604	Sept. 1919	Oct. 29, 1950
	Cons. 1,823		Unlimited
China (Tientsin)	C.H. 273	Sept. 1914	Unlimited
	Cons. 18	April 17, 1919	Unlimited
*Costa Rica	1,089	April 15, 1919	April 15, 1934
Cuba	33,059	Nov. 10, 1917	Nov. 9, 1962
Czechoslovakia	91,751	June 2, 1920	March 5, 1953
Denmark	219/1913	March 29, 1913	March 29, 1953

Dutch East Indies	26,302	Sept. 19, 1916	Aug. 13, 1956
*Egypt	262	Feb. 9, 1935	Feb. 9, 1945
***Federated Malay States		June 23, 1919	
Finland	11,278	Sept. 13, 1929	June 22, 1950
			Being renewed
*Fiji Islands	1/140	Aug. 13, 1919	May 6, 1933
France	54,322	April 22, 1918	Dec. 17, 1962
***French Indo China		April 11, 1920	
		Dec. 30, 1930	
Germany	171,051	Dec. 22, 1922	Dec. 30, 1942
			Being renewed
Great Britain	374,638	May 22, 1917	Sept. 8, 1958
"	547,364	March 21, 1934	Dec. 30, 1961
*Guatemala	1,740	Feb. 15, 1922	Feb. 15, 1932
"	1,741	Feb. 15, 1922	Feb. 15, 1932
*India	1,051	Sept. 26, 1918	New appl'n. filed
	Appl'n. 141,962	Jan. 11, 1950	Being processed
*Upper India	110/19	April 28, 1919	New appl'n. filed
Ireland	43,365	Feb. 26, 1934	June 3, 1961
Italy	85,610	Nov. 21, 1913	Sept. 29, 1963
Japan (Korea)	105,374	July 14, 1919	July 14, 1959
Japan	186,707	Nov. 22, 1926	Being reinstated
			and renewed
"	186,811	Nov. 26, 1926	Being reinstated
			and renewed

Country	Reg. No.	Date	Expires
*Jugoslavia	602	Oct. 3, 1921	Oct. 3, 1941
*Mexico	16,368	March 25, 1919	March 17, 1939
Netherlands	65,252	Sept. 1, 1933	Sept. 1, 1953
Newfoundland	743	March 7, 1919	Unlimited
*Nicaragua	2,050	Dec. 9, 1929	Dec. 9, 1939
Norway	28,322	April 15, 1940	April 14, 1960
Pakistan	Appl'n. 9,364	Dec. 31, 1949	Being processed
*Panama	732	March 9, 1921	March 9, 1941
*Peru	666 (266/19)	June 10, 1919	Sept. 4, 1939
*Philippines	1,661	Oct. 16, 1914	Oct. 16, 1944
Philippines	Serial 827	Nov. 26, 1948	Being processed
*Poland	8,655	Oct. 5, 1925	Oct. 5, 1935
"	9,567	Nov. 9, 1925	Nov. 9, 1935
*Porto Rico	1,118	April 8, 1921	April 8, 1941
*Portugal	25,718	July 13, 1922	July 13, 1932
"	25,719	July 13, 1922	July 13, 1932
"	27,811	July 19, 1922	July 19, 1932
"	28,947	April 12, 1923	April 12, 1933
*Salvador	542	Oct. 24, 1919	Oct. 24, 1934
*Santo Domingo	661	May 24, 1919	May 24, 1929
*Siam	A-81	Feb. 2, 1932	Oct. 1, 1941
*South Africa	378/1919	April 6, 1920	
***Straits Settlements		May 30, 1919	
Sweden	43,976	Oct. 16, 1913	Sept. 17, 1954

Switzerland
 *Uruguay (Renewal of No. 9,814)
 *Venezuela

98,682	Sept.	20, 1940	Sept.	20, 1960
21,514	Nov.	22, 1920	Nov.	21, 1940
2,640	Oct.	15, 1919	Oct.	15, 1939

*Expired registration.

**Label copyright in name of The J. K. Arnshy Co.

***Publication of claim of ownership rather than a registration.

EXHIBIT C

Calpack hereby sells, assigns and transfers to Exchange its entire right, title and interest in and to the trade-mark "Sun-Kist" and the registration thereof, No. , together with that part of the good will of the business of Calpack connected with the use of and symbolized by the mark, but not the good will connected with the use of and symbolized by any other trade-mark used in its business.

[Endorsed]: Filed February 3, 1955.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 23, inclusive, contain the original

Motion to Dissolve Injunction;

Memorandum for Order;

Supplemental Affidavit of Earle G. Granger;

Order Dismissing Defendant's Motion to Dissolve Injunction;

Notice of Appeal;

Designation of Contents of Record on Appeal;

which, together with a full, true and correct copy of Bond for Costs on Appeal; and 1 volume of deposition of Charles Griffin, Jr., in the above-entitled

cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, all in the said case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by the appellant.

Witness my hand and the seal of the said District Court this 26th day of March, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15087. United States Court of Appeals for the Ninth Circuit. Sun-Maid Raisin Growers of California, Appellant, vs. California Packing Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: March 28, 1956.

Docketed: April 4, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
15087

SUN-MAID RAISIN GROWERS OF CALIFORNIA, a Corporation,
Defendant-Appellant,
vs.

CALIFORNIA PACKING CORPORATION, a Corporation,
Plaintiff-Appellee.

DEFENDANT-APPELLANT'S STATEMENT
OF POINTS TO BE RELIED UPON ON
APPEAL

The points on which appellant, Sun-Maid Raisin Growers of California intends to rely in this Court in this case are as follows:

1. The Court erred in not granting defendant's Motion to Dissolve Injunction dated December 14, 1954.

2. The Court erred in holding that prior permission of the Court of Appeals was required to bring the Motion to Dissolve Injunction in the District Court.

BOYKEN, MOHLER & WOOD.
GORDON WOOD,

By /s/ GORDON WOOD,
Attorneys for Defendant, Sun-Maid Raisin Growers
of California.

San Francisco, California.

Dated: April 3, 1956.

Certificate of Service by Mail Attached.

[Endorsed]: Filed April 4, 1956.



No. 15,087

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SUN-MAID RAISIN GROWERS OF CALI-
FORNIA, a Corporation,

Appellant,

VS.

CALIFORNIA PACKING CORPORATION, a
Corporation,

Appellee.

OPENING BRIEF FOR APPELLANT SUN-MAID.

BOYKEN, MOHLER & WOOD,
GORDON WOOD,

723 Crocker Building, San Francisco 4, California,

Attorneys for Appellant,

*Sun-Maid Raisin Growers
of California.*

FILE

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PAUL B. O'BRIEN, C

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No. 15,087

IN THE

United States Court of Appeals
For the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALI-
FORNIA, a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION, a
Corporation,

Appellee.

OPENING BRIEF FOR APPELLANT SUN-MAID.

INTRODUCTION.

This is an appeal from an order dismissing defendant's motion to dissolve an injunction. The order was entered in the United States District Court for the Southern District of California on January 31, 1956. The injunction sought to be dissolved was granted by the District Court nearly twenty years ago on June 15, 1936 against defendant-appellant, Sun-Maid Raisin Growers of California.

JURISDICTION.

Jurisdiction in the District Court was present because it issued the injunction sought to be dissolved,

United States v. Swift and Co., et al. (1932), 286 U.S. 106; 52 S.Ct. 460.

This court has appellate jurisdiction under 28 U.S.C. Section 1291 and 28 U.S.C. Section 1292 (1) and under *Jackson v. Heiser* (C.A. 9th, 1940), 111 F.2d 310.

STATEMENT OF THE CASE.

1. History.

The injunction (R 5-6) was issued as the result of a suit by plaintiff,* California Packing Corporation, charging infringement by defendant of plaintiff's trademark SUN-KIST. Such alleged infringement was based on use by defendant of the trademark SUN-MAID.

After trial of the case, the United States District Court held that plaintiff was not entitled to the injunction, *California Packing Corporation v. Sun-Maid Raisin Growers of California*, 7 F.Supp. 497. Upon appeal the decision was reversed by this court, *California Packing Corporation v. Sun-Maid Raisin Growers of California*, 81 F.2d 674, and the injunction was issued by the District Court.

2. The Law of the Case.

Although this suit was originally based on an alleged confusing similarity between the trademarks SUN-KIST and SUN-MAID the trial court found no confusing similarity existed (7 F.Supp. 497), a

*For convenience the parties will be referred to herein as plaintiff and defendant.

finding that was not disturbed by the Court of Appeals (81 F.2d 674). Instead, this court decreed the issuance of the injunction because of the existence of a contract dated March 10, 1917, between the predecessors of the parties by which the use of the trademark SUN-MAID was restricted to raisins and raisin products.

Thus, the issue of confusing similarity is not present in this appeal having been previously disposed of adversely to plaintiff.

The contract of March 10, 1917 (R 9-15) is clearly analyzed by Judge Wilbur in *California Packing Corporation v. Sun-Maid Raisin Growers of California*, 81 F.2d 674.

Although the present defendant obtained the SUN-MAID trademark through a bankruptcy proceeding without knowledge of the contract of March 10, 1917, the law of this case is that defendant was nevertheless bound by the restrictions in the contract limiting the use of the SUN-MAID trademark to raisins and raisin products.

3. The Motion to Dissolve the Injunction.

The present motion to dissolve the injunction was brought on the ground that changed conditions arising since the issuance of the injunction make prospective application of the injunction unfair to defendant and of no benefit to plaintiffs. Defendant's reasons for urging dissolution may be summarized as follows:

(a) On September 20, 1950, plaintiff assigned all of its interest in the trademark SUN-KIST together

with the goodwill of the business connected therewith (R 44). Since the injunction was issued for the purpose of protecting plaintiff's interest in the SUN-KIST trademark, no legitimate reason now exists for the enforcement of restrictions imposed by the injunction.

(b) The injunction has, by changed conditions, been perverted and now constitutes a means for enforcing an illegal contract and restraining trade in violation of state and federal antitrust laws.

(c) California Fruit Growers Exchange, assignee of the SUN-KIST trademark, has waived any benefit under the contract of March 10, 1917, and has assumed a neutral position.

Defendant therefore contends in this appeal that:

1. The District Court erred in not granting defendant's Motion to Dissolve Injunction, dated December 14, 1954.
2. The District Court erred in holding that prior permission of the Court of Appeals was required to bring the Motion to Dissolve Injunction in the District Court.

ARGUMENT.

1. THE PROCEDURAL QUESTION.

Before considering the merits of the case the procedural question should first be disposed of to bring into focus the questions actually before this court.

The order appealed from is based on a Memorandum for Order, dated January 20, 1956 (R 18-19) in which the District Court denied defendant's motion without prejudice on the purely procedural ground that prior permission of the Court of Appeals should have been obtained before bringing the motion in the District Court. The reason given for this holding was that the injunction now sought to be dissolved issued from the District Court pursuant to a mandate from the Court of Appeals. It is defendant's contention here that no such prior permission is required under the facts of this case but this question may now have become moot because such permission is now hereby requested.

In the interest of eliminating duplication of effort defendant submits that this court should dispose of the entire matter and avoid referring any phases of the case back to the District Court.

A. Prior Permission of Court of Appeals Not Required.

Despite the fact that this court may consider the point moot, the following argument is offered in support of defendant's contention that prior permission of the Court of Appeals was not required to bring the motion in the District Court.

Rule 60(b) of the Federal Rules of Civil Procedure reads in part as follows:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .

- (5) The judgment has been satisfied, released, or discharged, or a prior judg-

ment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application.*"

Judge Clark, the Reporter to the Supreme Court Advisory Committee establishing the rule* explains it in *S. C. Johnson & Son, Inc. v. Johnson, et al.*, (C.A. 2d, 1949) 175 F.2d 176, as follows (page 184):

"Not only does this not call for appellate permission when a case has been affirmed on appeal, but it is obvious that such permission is an unnecessary and undesirable clog on the proceedings. An appellate court cannot act understandingly under F.R. 60(b) without the necessary record which the proceedings in the trial court must supply. To expect it to grant or withhold permission in advance is a futility and an obstruction. The rules themselves quite carefully show when, if ever, appellate permission is to be sought. See F.R. 60(a) as amended and compare also amended F.R. 73(a) and 75(h)."

Nevertheless some courts have admittedly required, in some instances, prior permission of the appellate court including the Court of Appeals for the third circuit from which circuit the case of *Butcher & Sherard v. Welsh* (CA 3d, 1953), 206 F.2d 259, 262 was relied on by the District Court.

*It is of interest to note that the Advisory Committee on Rules of Civil Procedure has proposed revision of Rule 60(b) so that leave of the Appellate Court is expressly obviated in the instant situation (18 F.R.D. Appendix page 40).

That the instant case clearly distinguishes from the *Butcher* case is pointed out in *Moore's Federal Practice* Volume 7, page 339, as follows:

“At times a motion for relief will not raise matters that are within the compass of the mandate, and in that event the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court. But where the action which the district court is asked to take under 60(b) would disturb the judgment which the appellate court's mandate ordered, *or would otherwise be inconsistent with the mandate*, the general doctrine is that the district court lacks power to proceed with the motion unless and until leave is granted by the appropriate appellate court.” (Citing cases, including the *Butcher* case.)

Thus, in the instant case, the sale of the trademark SUN-KIST, which is the fact giving rise to defendant's right to relief from the injunction, did not occur until fourteen years *after* this appellate court held that the injunction should issue. Obviously this subsequent happening could not possibly be “within the compass of the mandate”.

In other words, defendant is not urging that the injunction should not have been issued, but rather that it should have no prospective effect. The power to modify the injunction always remained in the District Court, *United States v. Swift & Co.*, 286 U.S. 106; 52 S.Ct. 460 (462).

2. THE INJUNCTION.

A. Plaintiff Is No Longer Entitled to Injunction.

The injunction sought to be dissolved was issued for the sole purpose of protecting plaintiff's interest in the trademark SUN-KIST. Thus, as stated in Judge Wilbur's opinion in *California Packing Corporation v. Sun-Maid Raisin Growers of California*, 81 F.2d 674, 676:

"The controversy was first brought to the attention of the courts on June 21, 1915, by an action begun by J. K. Armsby Company, appellant's predecessor, against the California Associated Raisin Company, appellee's predecessor, wherein J. K. Armsby sought to enjoin the use of the trademark 'Sun-Maid' on raisins because of its prior use of the term 'Sun-Kist' for the same purpose. *The parties settled that litigation by contract dated March 10, 1917.*"

If, at the time the injunction was sought, the SUN-KIST trademark had been abandoned by plaintiff, there would have been no interest to protect by injunction and no court of equity would ever have provided such an extraordinary remedy. Plaintiff has now completely abandoned the trademark SUN-KIST and has, therefore, no protectible interest insofar as the injunction is concerned.

An injunction is a remedy, not a cause of action, and should not be granted or continued in effect if no cause of action exists. The contract of March 10, 1917 (R 9-15) could not be enforced at this time by plaintiff and therefore the injunction supporting said

contract should not be perpetuated. An injunction looks to the future (*Douglas v. City of Jeanette*, 319 U.S. 157; 63 S.Ct. 877), and should therefore be dissolved if its past justification ceases to exist.

B. Injunction Should Be Dissolved When Changed Conditions Render It Inequitable to Defendant.

Particularly pertinent to this motion is the case of *Coca-Cola Co. v. Standard Bottling Co.*, (CA 10th, 1943) 138 F.2d 788, in which an injunction against the defendant, prohibiting its use of the word "cola" on any beverage, was modified about sixteen years after the decree when it appeared that plaintiff in the original case no longer had any exclusive right to the word "cola".

In the instant case, plaintiff has abandoned the use of the trademark SUN-KIST and no longer has any right to use it. By the reasoning of the *Coca-Cola* case the injunction should therefore be dissolved.

Furthermore, a trademark owner abandons a mark by transferring it to an assignee. *Bourjois & Co., Inc. v. Katzel*, 260 U.S. 689; 43 S.Ct. 244 (1923); *Schenley Distilling Co. v. Schenley Distillers Corp.*, D.C.S.D. N.Y., 1948) 78 USPQ 192. This is so even if the attempted transfer is invalid. *La Fayette Brewery, Inc. v. Rock Island Brewing Co.*, (C.C.P.A., 1937) 87 F.2d 489. Such abandonment involves the "loss not only of the right to exclude others, but also of the prior appropriator's right to use the name in trade". *Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp.*, (C.A.D.C., 1939) 109 F.2d 35, 45 (footnote 47).

Therefore, the transferor (plaintiff) has no enforceable interest in either the injunction or the contract between predecessors of plaintiff and defendant and no reason for the continuance of the injunction exists.

C. Injunction Merely Injures Defendant With No Legitimate Benefit to Plaintiff.

Plaintiff, no longer owning or using the subject matter for the protection of which the injunction was granted, will achieve no further benefit from the injunction. On the other hand, defendant, being restricted in its use of the trademark SUN-MAID is injured and is threatened by greater injury in that it cannot expand the use of its own trademark. Furthermore, defendant is hindered in preventing unauthorized use of its own name SUN-MAID by others on food products because its use is circumscribed by the injunction. Continuation of the injunction under present circumstances prevents defendant from selling nonraisin products under its trademark in competition with plaintiff who now owns no conflicting trademarks.

Under these circumstances, where there is no legitimate benefit to plaintiff and only oppression on defendant, the courts have uniformly refused to grant injunctions.

The rule is stated in *Leonardo v. Leonardo*, (C.A. D.C., 1944) 145 F.2d 849 as follows:

“ . . . a mandatory injunction should be denied when its issuance will cause injury to the defendant and no benefit or very little benefit to the plaintiff.”

And in *Gassard Breeding Estates v. Texas Co.*, (D.C. Colo., 1946) 76 F.Supp. 20, the following pertinent statement is found:

“And where an injunction may seriously affect the interests of the defendants, and would be of no advantage to the plaintiffs, the court in the exercise of judicial discretion—which it is bound to exercise—may properly refuse to grant the injunction.”

D. The Injunction Has Become an Illegal Restraint of Trade.

A contract by which a party is bound not to compete in specified fields is an illegal restraint of trade unless the covenant not to compete is “ancillary to the main purpose of a lawful contract”, *United States v. Addyston Pipe & Steel Co.*, (CCA 6th, 1898) 85 F. 271.

In the *Addyston* case the above principle is explained in the light of its now prevailing exceptions. For example, as stated in the *Addyston* case, a contract by which a vendor of a business promises not to compete with his vendee is a typical exception to the general rule and is justified by the fact that such a contract promotes the free purchase and sale of property.

Likewise, the contract of March 10, 1917 (R 9-15), which we are concerned with here, would have been an illegal restraint on the business activity of the covenantor had it not been for the fact the contract was based on the alleged confusing similarity of the trademarks SUN-KIST and SUN-MAID. In other words the proprietary protection afforded the owner of the SUN-KIST trademark was the “main purpose”

of that contract. The covenant by defendant's predecessor to restrict the use of the SUN-MAID trademark to certain specified goods was therefore "merely ancillary to the main purpose of a lawful contract".

Had the "main purpose" (the SUN-KIST trademark) not been present at the time the contract was entered into, the covenant not to compete would have been illegal and unenforceable from the start. Now that the trademark SUN-KIST has been abandoned by the covenantee the "main purpose" of the contract ceases to exist and the covenant, standing by itself, becomes an illegal restraint per se.

The reason for the remedy having ceased to exist, the injunction has been perverted to lend color of legality to an otherwise illegal covenant preventing competition between the parties.

The plaintiff has urged, in the District Court, that a legitimate purpose still exists for the injunction because it obviates confusion by the public between the SUN-MAID and SUN-KIST trademarks. This argument overlooks the law of this case which is that there is no confusing similarity between the two trademarks.

E. Benefit Now Accruing to Defendant Is Unconscionable.

Defendant admits that plaintiff presently benefits from this injunction but contends that the benefit accruing was neither contemplated by the parties to the contract of March 10, 1917 nor is it conscionable in view of the detriment now suffered by defendant.

The injunction obviously eliminates defendant as a competitor to plaintiff except for the sale of raisins and raisin products, but the contract was for the pur-

pose of protecting the SUN-KIST trademark, not to keep defendant out of the grocery business. Having sold the trademark SUN-KIST for \$1,250,000 to California Fruit Growers Exchange (R 41-49) plaintiff now wishes to reap another million dollars worth of benefit by retaining the power of the injunction to stifle defendant's operations. This is indeed a perversion of legal process.

Just as there can be no assignment of a trademark in gross there cannot be a remedy apart from the cause of action that justifies it. Plaintiff has abandoned the trademark SUN-KIST and now seeks to perpetuate a remedy designed to protect it.

Plaintiff not only divested itself of the trademark SUN-KIST but also "the goodwill of the business of Calpack connected with the use of and symbolized by the mark" (R 44).

Plaintiff, however, has urged before the District Court that some sort of residuum of interest remains so that plaintiff must now guard against use of the trademark in a manner unfavorable to plaintiff. Thus, not only would plaintiff sell the cause of action and retain the remedy but it would also sell its trademark and retain the associated goodwill.

This "have your cake and eat it" theory smacks of the same "hocus-pocus" condemned by Judge Minton of the Court of Appeals for the Third Circuit in *California Fruit Growers Exchange v. Sunkist Baking Co.*, 166 F.2d 971. In that case the present plaintiff and its assignee sought to divide the good will of the **Sunkist** and SUN-KIST trademarks between themselves by the contract on pages 50 to 52 of the record

in this case. Judge Minton's impression of this chicanery is expressed as follows (166 F.2d 975):

“We are supposed to believe that when a customer bought fruits or vegetables under the name ‘Sunkist’, he was not confused as to whether the fruit came from the California Fruit Growers Exchange or the vegetables from the California Packing Corporation; but if he bought a loaf of bread under the name ‘Sunkist’, he was likely to think he bought it from one or the other of the plaintiffs because they sold fruits and vegetables, but never bread. With the plaintiffs practicing such hocus-pocus with the trade-name ‘Sunkist’, we shall ask to be excused when we are admonished by these dividers of confusion by contract to hear their vice president and advertising manager shout confusion on behalf of the purchasing public.”

The “hocus-pocus” still continues, however, with the plaintiff contending, despite its abandonment of the trademark SUN-KIST, that it still retains the associated goodwill, and, despite its loss of a cause of action it can use the defensive remedy as an offensive weapon to enjoin defendant's operations.

Clearly plaintiff's previous conduct has disqualified it from any further equitable relief.

F. Present Owner of SUN-KIST Trademark.

In view of the District Court's suggestion (R 18) of the “possibility that California Fruit Growers Exchange, as successor in interest of plaintiff, may be a necessary, or an indispensable party to any modification proceedings” the status of the assignee of the SUN-KIST trademark should be considered.

At the outset it is important to note that California Fruit Growers Exchange (now Sunkist Growers, Inc.) does not and never has used the trademark SUN-KIST (hyphenated). Its trademark is “**Sunkist**” (unhyphenated) which it has employed since long prior to October, 1915 (R 52).

Exchange was not a party to the litigation that resulted in issuance of the injunction. If there was any confusing similarity between SUN-MAID and “**Sunkist**”, Exchange did not seek to establish it and no remedy for the protection of “**Sunkist**” has been made available to it.

Exchange was not a party to the contract of March 10, 1917, and there is nothing in the record indicating that it is an assignee of said contract.

Exchange, however, had notice of these proceedings and informed defendant that the dissolution of this injunction was a matter “to be resolved between defendant and plaintiff, and that it desired neither to consent or object thereto” (R-17). Such neutrality is unfair to defendant and is not consistent with the position of one who requires the extraordinary remedy of injunction to protect a valued trademark.

In other words, Exchange has nothing more now than it had before the assignment except it has obtained freedom from suit by plaintiff herein. The abandonment of the trademark SUN-KIST may well be worth the consideration paid for it in view of the stigma attached to the agreement of October 7, 1915, between Exchange and plaintiff and which agreement is of dubious legality in view of the “hocus-pocus” practiced through it. However, though assignment of

the SUN-KIST trademark (R 41-49) purports to convey the trademark to Exchange for its own use, Exchange has not in fact used SUN-KIST and has therefore abandoned any right to use it. For the \$1,250,000 paid to plaintiff, Exchange obtained merely a covenant not to sue from plaintiff, and thereby became entitled to unrestricted use of the "**Sunkist**" trademark free from the restrictions of the agreement of October 7, 1915 (R 50-52).

Since the question of confusing similarity between SUN-KIST and SUN-MAID is not involved in this case there are no rights residing in Exchange that are in any way affected by the dissolution of the injunction now before this court. Exchange is therefore not a proper party to this proceeding.

CONCLUSION.

It is earnestly urged that the injunction dated June 15, 1936 issued pursuant to the mandate of this court should be dissolved by this court forthwith without further proceedings in the District Court.

Dated, San Francisco, California,
June 8, 1956.

Respectfully submitted,
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No. 15,087

IN THE

United States Court of Appeals
For the Ninth Circuit

SUN-MAID RAISIN GROWERS OF CALIFORNIA,
a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION,
a Corporation,

Appellee.

BRIEF OF APPELLEE
CALIFORNIA PACKING CORPORATION.

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FILED

JUL 27 1956

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IN THE

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a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION,
a Corporation,

Appellee.

**BRIEF OF APPELLEE
CALIFORNIA PACKING CORPORATION.**

STATEMENT AS TO JURISDICTION.

The district court had jurisdiction to enter its order declining to proceed without leave of this Court (28 U.S.C. 1332).

This Court, it is submitted, is without appellate jurisdiction, for the order of the district court was neither a final decision (28 U.S.C. 1291) nor an appealable interlocutory order (28 U.S.C. 1292). Accordingly, the appeal from said order should be dismissed.

This Court has jurisdiction to determine whether leave should be granted defendant to file in the district court

its motion to dissolve the injunction entered pursuant to mandate of this Court (*Rogers v. Consolidated Rock Products Co.* (9 Cir. 1940) 114 F.2d 108, 111; *Butcher & Sherrerd v. Welsh* (3 Cir. 1953) 206 F.2d 259, 262; *Federal Deposit Insurance Corp. v. Alker* (3 Cir. 1955) 223 F.2d 262).

STATEMENT OF THE CASE.

This action was brought by plaintiff-appellee California Packing Corporation for an injunction to enforce the terms of a written contract dated March 10, 1917, between predecessors in interest of California Packing Corporation and defendant-appellant Sun-Maid Raisin Growers of California¹ (R. 9-15). The 1917 contract provided that plaintiff withdraw a pending trade-mark infringement suit and that defendant thereafter use its mark "Sun-Maid" "only on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins"² (R. 13). Subsequent to the contract, and in violation of its express terms, defendant commenced using its mark "Sun-Maid" on other than raisin products, whereupon plaintiff in 1929 brought this action to restrain permanently such use.

The district court initially refused to issue the injunction (*California Packing Corp. v. Sun-Maid Raisin Growers* (S.D.Cal. 1934) 7 F.Supp. 497). Plaintiff appealed and this Court reversed, directing that a permanent in-

¹For convenience the parties to said contract will hereinafter be referred to as plaintiff and defendant.

²Throughout this brief emphasis is ours unless otherwise indicated.

junction issue (*California Packing Corporation v. Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674). In its decision upholding the 1917 contract and ordering that defendant be perpetually enjoined from using its mark on other than raisin products this Court stated (p. 678):

“The appellee [defendant] limited its right of ownership in the trade-mark ‘Sun-Maid’ to the use of it in connection with raisins and raisin products. The contract so states. This view was adopted by the Court of Customs and Patent Appeals in litigation before that court between the parties hereto [*California Packing Corporation v. Sun-Maid Raisin Growers of California* (Cust.& Pat.App.) 64 F.(2d) 370, 373], where the appellant [plaintiff] was contesting the right of the appellee to register the trade-mark ‘Sun-Maid’ as to other than raisin products. That court held that the contract of March 10, 1917, gave the Sun-Maid Company only limited ownership in the trade-mark ‘Sun-Maid’ and that it could not register the mark for any other product. The court said: ‘If an applicant has by contract divested himself of ownership of and the right to use a mark for which he makes application for registration, he is not the “owner” of the mark. * * * Under the contract, appellee is not the owner of the mark, and was precluded from using the same as applied to such goods.’ ”

And the Court added (p. 678):

“It is clear that if, as we have held, the appellee was bound by the contract of March 10, 1917, not to use its trade-mark ‘Sun-Maid’ upon products other than raisin products, it could not acquire a right to do so in direct contravention of the terms of the contract.”

Pursuant to mandate of this Court, the district court entered its final decree dated June 15, 1936 (R. 7-9), and issued a permanent injunction (R. 5-6) enforcing the limitation upon use of its mark that defendant had voluntarily accepted by the 1917 contract. That decree provided (R. 8):

“Now, Therefore, it is Ordered that said mandate be filed herein and spread upon the minutes of this court, and *on reading and filing said mandate and in pursuance thereof,*

* * * * *

It is * * * Ordered, Adjudged and Decreed that an injunction issue herein perpetually enjoining and restraining the defendant, its agents and servants, and all claiming and holding through or under it, from using the trade-mark ‘Sun-Maid’ otherwise than on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins * * *.’”

By agreement dated September 20, 1950, plaintiff sold its trade-mark “Sun-Kist” to California Fruit Growers Exchange (R. 42-49). On December 14, 1954, defendant filed a motion (R. 3-4) in the district court to dissolve the permanent injunction issued June 15, 1936, on the ground that plaintiff’s sale of said trade-mark in 1950 constituted such a change of conditions as to justify abrogation of the 1917 contract between the parties and dissolution of the injunction against defendant.

Defendant did not seek leave of this Court to file the said motion in the district court. Plaintiff objected that such leave was a prerequisite of consideration of the merits of the motion by the district court, and that in any

event there was no change of circumstances sufficient to warrant dissolution of the injunction.

On January 20, 1956, the district court filed its memorandum for order dismissing the said motion for defendant's failure to apply to this Court for leave to file the motion, and therefore declining to reach the merits of the motion (R. 18-19). On January 30, 1956, the district court entered its order dismissing said motion without prejudice (R. 19-20).

Instead of applying to this Court for leave to file the motion, defendant appealed from said order of the district court dismissing the motion (R. 20-21).

**THE ISSUES FOR DECISION AND SUMMARY
OF CONTENTIONS OF APPELLEE.**

There are three issues before the Court for decision on the record herein:

1. Whether the order of the district court dismissing the motion of defendant without prejudice to its renewal upon defendant's obtaining leave of this Court to file such motion is an appealable order;

2. Whether this proceeding, though dismissed as an appeal from the said order of the district court, should be treated as an application by defendant for leave of this Court to present the said motion to dissolve the injunction in the district court; and

3. If this proceeding is treated as such application, whether leave should be granted defendant to seek dissolution of the injunction in the district court.

The merits of the motion by defendant to dissolve the injunction are not properly before this Court at this time.

It is plaintiff's position that:

A. The district court correctly held that leave of this Court is a prerequisite to consideration of a motion for dissolution of the injunctive decree entered pursuant to mandate of this Court;

B. The order of the district court dismissing defendant's motion on the preliminary ground that leave of this Court was not first obtained, and declining to reach a consideration of the merits of the motion, is not an appealable order, and this purported appeal from that order should be dismissed; and

C. If this appeal is to be treated as an application to this Court for leave to move for dissolution of the injunction in the district court, defendant has not made a prima facie showing of merit sufficient to warrant the granting of such leave for these reasons:

1. The original basis for granting the injunction exists unchanged.

2. Dissolution of the injunction would in effect nullify an outstanding contract between plaintiff and defendant, and thereby unfairly deprive plaintiff of the consideration which induced it to enter the contract.

3. Defendant has not shown that the injunction which it seeks to have dissolved is oppressive; rather, defendant seeks by its motion to avoid its contractual obligations enforced by the decree of this Court.

ARGUMENT.

A. THE DISTRICT COURT CORRECTLY HELD THAT LEAVE OF THIS COURT IS A PREREQUISITE TO CONSIDERATION BY THE DISTRICT COURT OF A MOTION FOR DISSOLUTION OF AN INJUNCTIVE DECREE ENTERED PURSUANT TO MANDATE OF THIS COURT.

It is well established that, before a motion to dissolve, vacate or otherwise modify a judgment or decree entered by a trial court pursuant to mandate of an appellate court may be considered by the trial court, leave must first be obtained from the appellate court.

Rogers v. Consolidated Rock Products Co. (9 Cir. 1940) 114 F.2d 108, 111;

Simmons Co. v. Grier Bros. Co. (1922) 258 U.S. 82, 85, 91;

International Ry. Co. v. Davidson (W.D.N.Y. 1945) 65 F.Supp. 58, 61;

Hazel-Atlas Co. v. Hartford Co. (1944) 322 U.S. 238, 248;

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Butcher & Sherrerd v. Welsh (3 Cir. 1953) 206 F.2d 259, 262;

Home Indemnity Co. of New York v. O'Brien (6 Cir. 1940) 112 F.2d 387.

This Court stated in *Rogers v. Consolidated Rock Products Co.* (9 Cir. 1940) 114 F.2d 108, *supra* (p. 111):

“If a decree is entered pursuant to the mandate of an appellate court, proper deference to its authority

requires that a proceeding to reopen it, whether by rehearing or review, should first be referred to that tribunal. *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 91, 42 S.Ct. 196, 66 L.Ed. 475.”

In *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, *supra*, a petition was filed in the Third Circuit Court of Appeals for leave to file a bill of review in the district court to set aside a judgment entered by that court pursuant to the mandate of the Third Circuit. Discussing the required procedure, the court said (p. 248):

“The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court. *National Brake Co. v. Christensen*, 254 U.S. 425, 430-433.”

In *International Ry. Co. v. Davidson* (W.D.N.Y. 1945) 65 F.Supp. 58, *supra*, defendants moved in the district court for an order under Rule 60(b) of the Federal Rules of Civil Procedure vacating a permanent injunction entered pursuant to mandate of the United States Supreme Court. The district court, holding that it was without power to act until defendants obtained leave of the Supreme Court to present such motion, said (p. 61):

“It is contended by the plaintiffs that this court has no jurisdiction in the matter * * * because it can not

entertain a motion to vacate, modify or set aside a decree entered according to a mandate of the Supreme Court without permission of that court having first been obtained. It seems to me that this court has not jurisdiction without such permission. The mandate from the Supreme Court * * * directed that an injunction issue. The only authority in the lower court on the remand is to follow the provisions of the mandate itself. * * *

The government cites *United States v. Swift* [286 U.S. 106], *supra*, as showing that the lower court modified the decree entered on the mandate. The opinion shows that the Supreme Court in the District of Columbia modified an earlier decree of the same court. The appeal to the Supreme Court was from a decree modifying an injunction by the lower court, and there is no question of any mandate issued by the U. S. Supreme Court.”

And in *Butcher & Sherrerd v. Welsh* (3 Cir. 1953) 206 F.2d 259, *supra*, on motion of defendants the district court entered an order setting aside a prior judgment entered pursuant to mandate of the Third Circuit Court of Appeals. Petitioners sought writs of mandamus and prohibition to compel the district court to withdraw its order on the ground that leave of the Third Circuit to file the motion to set aside the judgment had not been obtained. The Third Circuit granted the writs and stated (p. 262):

“Where a judgment has been affirmed on appeal and the mandate handed down it is beyond the power of the lower court to disturb the judgment without leave of the appellate court. This procedure is required by long-settled principles. *Simmons Co. v. Grier Bros. Co.*, 1922, 258 U.S. 82, 42 S.Ct. 196, 66 L.Ed. 475; *National Brake & Electric Co. v. Christensen*, 1921,

254 U.S. 425, 41 S.Ct. 154, 65 L.Ed. 341; *In re Potts*, 1897, 166 U.S. 263, 17 S.Ct. 520, 41 L.Ed. 994; *Brady v. Beams*, 10 Cir., 1943, 132 F.2d 985; *Simonds v. Norwich Union Indemnity Co.*, 8 Cir., 1934, 73 F.2d 412. * * *

Respondent contends that recent amendments to Rule 60(b) of the Federal Rules of Civil Procedure confer upon the trial court the power to grant relief from the operation of a judgment without prior approval of the appellate court. We cannot subscribe to this contention. Rule 60(b), while enlarging the power of the District Courts over judgments without respect to the running of the term of court, does not confer upon District Courts the power to alter or amend a judgment which has been affirmed by this court or the Supreme Court, for such alteration would affect the decision of the reviewing court, which it is not within the power of the District Courts to do. *Home Indemnity Co. of New York v. O'Brien*, 6 Cir., 1940, 112 F.2d 387."

Defendant first argues that the established rule of the foregoing cases is unsound (*Op.Br.*, p. 6). It rests this argument on a quotation from a dissenting opinion in *S. C. Johnson & Son v. Johnson* (2 Cir. 1949) 175 F. 2d 176, 184, and a reference to a proposed revision of Rule 60(b) by the Advisory Committee on Rules of Civil Procedure, to the effect that prior permission of the appellate court is an undesirable requirement (*Op.Br.*, p. 6).

Professor Moore, a leading authority on Federal practice, dissented from the Advisory Committee's suggestion for revision of Rule 60(b)³ for reasons which he has else-

³See Report of Proposed Amendments to the Rules of Civil Procedure, 18 F.R.D., appx. 1, 10.

where cogently stated (7 Moore's Federal Practice (2d Ed.) p. 341, n. 25):

“Certainly in many cases a requirement of leave from the appellate court is not a useless and delaying formalism. See *Butcher & Sherrerd v. Welsh*, *supra*, n. 23; and the Court's statement in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, *supra*, n. 23. If an application to the appellate court is required, as in the past, the appellate court can screen out attacks that are clearly without merit. This usually does not require an elaborate record. If a *prima facie* case of merit is made out, the appellate court then grants leave, and the full hearing and record is made in the district court. We believe that the present practice does not impose barren requirements, nor unwarranted hurdles since the moving party is seeking relief from a final judgment after the case has been before at least one appellate court.”

Defendant also argues, alternatively, that the present motion relates to matters outside “the compass of the mandate” and that prior leave is thus not required (Op. Br., p. 7), quoting a passage by Professor Moore and citing *United States v. Swift & Co.* (1932) 286 U.S. 106. Professor Moore's statement that in some instances a motion in the district court will not raise matters within the compass of the mandate is illustrated in a footnote, omitted from defendant's quotation, where he explains (7 Moore's Federal Practice (2d Ed.) p. 339, n. 21):

“For example, where the appellate court orders a new trial and, following subsequent proceedings and judgment, a party moves for relief from the judgment
* * *.”

Where the mandate of an appellate court orders a new trial, and a judgment based on the new proceedings in the trial court is entered, relief from that judgment, *which was not directed or approved by the appellate court*, may properly be sought in the trial court without leave of the appellate court. Such a situation is patently distinct from present facts where, as defendant concedes (Op.Br., p. 7), this Court's mandate *directed* entry of the decree and permanent injunction.

Defendant's reliance upon the *Swift* case is also misplaced. As pointed out in *International Ry. Co. v. Davidson*, quoted at pages 8-9, *supra*, the decree modified by the district court in the *Swift* case was not entered pursuant to mandate of an appellate court, and the question of prior leave of such court was in no way involved. In short, neither case law nor Professor Moore supports defendant's contention that dissolution by the district court of the injunction herein would be outside the compass of this Court's mandate directing its issuance.

Under the established rule, therefore, it is manifest that defendant should have made application to this Court for leave to move the district court to dissolve the injunction issued pursuant to mandate of this Court. The order of the district court dismissing defendant's motion thus was proper and, if the order be held appealable, should be affirmed.

B. THE ORDER OF THE DISTRICT COURT DISMISSING DEFENDANT'S MOTION ON THE PRELIMINARY GROUND THAT LEAVE OF THIS COURT WAS NOT FIRST OBTAINED, AND DECLINING TO REACH A CONSIDERATION OF THE MERITS OF THE MOTION, IS NOT AN APPEALABLE ORDER; ACCORDINGLY, THIS PURPORTED APPEAL FROM THAT ORDER SHOULD BE DISMISSED.

It is well-settled law that, with certain exceptions hereafter discussed, the courts of appeals have jurisdiction only of appeals from *final* decisions of the district courts.

28 U.S.C. 1291;

Georgia Ry. Co. v. Decatur (1923) 262 U.S. 432, 437;

Cole v. Rustgard (9 Cir. 1933) 68 F.2d 316.

In *Cole v. Rustgard*, *supra*, this Court stated (p. 316):

“A case may not be brought up in fragments, but the decision appealed from must be final and complete, as to the subject-matter and as to the parties. *Collins v. Miller*, 252 U. S. 364, 370, 40 S. Ct. 347, 64 L. Ed. 616; *Arnold v. U. S. for Use of W. B. Guimarin & Co.*, 263 U. S. 427, 434, 44 S. Ct. 144, 68 L. Ed. 371. See O'Brien's *Man. Fed. App. Proc.* (2d Ed.) p. 60. The test of finality of a decision other than in the excepted cases is whether an affirmance by the appellate court will end the suit and leave nothing for the lower court to do but execute the decree. *Baxter v. Bevil Phillips & Co. et al.* (D. C.) 219 F. 309, 311. A judgment or decree which leaves the rights of the parties affected by it undetermined and open to further litigation is not a final decision. *Loflin et al. v. Ayres et al.* (C. C. A.) 164 F. 841.”

Defendant relies upon *Jackson v. Heiser* (9 Cir. 1940) 111 F.2d 310 (Op.Br., p. 2). In that case an order denying, *on the merits*, a motion to set aside a default judg-

ment for fraud was held appealable. Cases of appeals from orders denying motions for relief from prior judgments uniformly involve orders disposing of such motions on the merits. See:

Cromelin v. Markwalter (5 Cir. 1950) 181 F.2d 948;
Greenspahn v. Joseph E. Seagram & Sons (2 Cir. 1951) 186 F.2d 616;

In re Marachowsky Stores Co. (7 Cir. 1951) 188 F. 2d 686.

In contrast to the foregoing cases, here the order of the district court merely denied defendant's motion without prejudice to its renewal in the event that defendant secured leave of this Court to present the motion for consideration on its merits, and left the principal issues between the parties open for subsequent decision (see the district court's memorandum for order, R. 18). It is difficult to conceive an order more clearly interlocutory or one which more clearly, in this Court's language, "leaves the rights of the parties affected by it undetermined and open to further litigation" (*Cole v. Rustgard* (9 Cir. 1933) 68 F.2d 316, *supra*).

Section 1292(1) of Title 28 of the United States Code permits appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Defendant cites this section in its jurisdictional statement (Op.Br., p. 2), without discussion there or elsewhere in its brief.

Without exception, cases permitting appeals from interlocutory orders refusing to vacate injunctions involve determinations *on the merits* of such motions.

See:

American Grain Separator Co. v. Twin City Separator Co. (8 Cir. 1912) 202 Fed. 202;

Marine Midland Trust Co. of N. Y. v. Eybro Corporation (2 Cir. 1932) 58 F.2d 165;

Central Hanover Bank & Trust Co. v. Callaway (5 Cir. 1943) 135 F.2d 592.

In this case the district court did not "refuse dissolution of the injunction" within the meaning of the foregoing cases, but properly declined to proceed to a consideration of the merits of defendant's motion without leave of this Court first obtained.

For the foregoing reasons, it is respectfully submitted that defendant's appeal from the order of the district court should be dismissed. Instead of taking this appeal, defendant, in accordance with the order of the district court and established procedure, should have applied to this Court for leave to present the motion in the district court.

C. EVEN IF THIS PROCEEDING WERE TREATED AS AN APPLICATION BY DEFENDANT FOR LEAVE TO PROCEED IN THE DISTRICT COURT, DEFENDANT HAS FAILED TO MAKE A PRIMA FACIE SHOWING OF MERIT REQUIRED TO WARRANT THE GRANTING OF A FULL HEARING ON THE MOTION IN THE COURT BELOW. THE MOTION ITSELF IS NOT NOW BEFORE THIS COURT.

Defendant, in its brief, takes the position that, if leave of this Court is required, this appeal should be treated as an application for such leave; and, further, that to eliminate "duplication of effort" this Court should proceed to determine the motion on its merits, and thus

“avoid referring any phases of the case back to the District Court” (Op.Br., p. 5).

Preliminarily, it is to be noted that responsibility for any unnecessary effort in connection with the motion to dissolve rests squarely with defendant. Defendant would have avoided both the preliminary proceedings in the district court and this appeal if, in accordance with established procedure, it had first sought leave of this Court to file its motion. Defendant would also have saved time, expense and effort for the parties and the Court if it had, in accordance with the order of the district court, made proper application for leave to file the motion instead of taking this appeal.

In any event and assuming that this appeal can now be treated as an application for such leave, it is clear that the merits of the motion to dissolve the injunction are not before this Court for review or other consideration at this time. The most that can now be before this Court is the question whether the record establishes a *prima facie* showing of merit sufficient to warrant the granting of a full hearing in the district court.

The procedure is thus stated by Professor Moore (7 Moore’s Federal Practice (2d Ed.) p. 341, n. 25):

“If an application to the appellate court is required, as in the past, the appellate court can screen out attacks that are clearly without merit. * * * If a *prima facie* case of merit is made out, the appellate court then grants leave, and *the full hearing and record is made in the district court.*”

See also :

Federal Deposit Insurance Corp. v. Alker (3 Cir. 1955) 223 F.2d 262, 263;

Hazel-Atlas Co. v. Hartford Co. (1944) 322 U.S. 238, 248;

Butcher & Sherrerd v. Welsh (3 Cir. 1953) 206 F. 2d 259, 262.

The reasons for this procedure are clear. A prima facie showing of merit must first be made to the appellate court before which the case has once been so that it may know that its mandate, issued after extensive consideration, will not be departed from without substantial necessity therefor. If a showing sufficient to warrant granting of leave is made, the merits of the motion to dissolve, like other motions, are for consideration by the district court in the first instance. This Court does not have original jurisdiction to hear the motion itself, but has appellate jurisdiction over the final order of the district court disposing of the motion on the merits (see *United States v. Swift & Co.* (1932) 286 U.S. 106).

One additional circumstance underscores the impropriety of defendant's request that this Court dispose of the merits of the motion to dissolve on the record now before it. The district court in its memorandum for order (R. 18-19) noted that California Fruit Growers Exchange (now Sunkist Growers—not a party to this appeal) may be a necessary party to determination of the motion to dissolve.

Defendant, in an attempted refutation of this statement by the district court, refers to certain hearsay statements

and opinions and conclusions contained in the supporting affidavit of defendant's secretary (R. 17) to the effect that Sunkist Growers had assumed a position of neutrality in this proceeding. Defendant also asserts in its brief (Op. Br., p. 16) that Sunkist Growers has not used the "Sun-Kist" trade-mark and "has therefore abandoned any right to use it." None of these statements or assertions finds any support in the record. All are inconsistent with the fact that Sunkist Growers' predecessor, California Fruit Growers Exchange, acquired the "Sun-Kist" trade-mark at a cost of \$1,250,000 (R. 48), pursuant to a contract under which the plaintiff herein covenanted to render aid and assistance "in each and every suit and proceeding in which said trade-mark 'Sun-Kist' may now be or become involved or concerned" (R. 47). Under such circumstances and the record before this Court, there is adequate justification for the district court's view that the present owner of the "Sun-Kist" trade-mark may be a necessary or indispensable party to any ultimate hearing on the motion.

Moreover, the record clearly demonstrates that defendant has failed to make a prima facie showing of merit required to warrant the granting of leave to file a motion to dissolve in the district court.

1. The original basis for granting the injunction exists unchanged.

Reduced to its simplest terms, defendant's argument is that the injunction should be dissolved because title to the trade-mark "Sun-Kist" has passed from plaintiff to its successor in interest, Sunkist Growers. The present record does not indicate, and defendant does not contend,

that any other fact or circumstance which existed in 1936 is changed today.

Particularly notable is the fact that the agreement of March 10, 1917 (R. 9-15), which was the original basis for the injunction, continues in full force and effect.

The mandate of this Court directing that the injunction issue was not dependent, as defendant would suggest, upon ownership in perpetuity of the trade-marks in question by either plaintiff or defendant. This Court stated the purpose of the 1917 contract as follows (*California Packing Corporation v. Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674, 677-678):

“The purpose and effect of the contract of March 10, 1917, was to define the relative rights of each in its respective trademarks.”

In short, the injunction rested upon this Court's determination that, by the 1917 contract, defendant had divested itself of ownership in the “Sun-Maid” mark for any purpose but use with raisins and raisin products. Plaintiff's ownership of the trade-mark “Sun-Kist” was not the controlling factor in 1936; rather, it was defendant's limited ownership in its trade-mark “Sun-Maid.” As this Court pointed out, citing the conclusions of the Court of Customs and Patent Appeals (81 F.2d 678):

“‘Under the contract, appellee [defendant] is not the owner of the mark, and was precluded from using the same as applied to such goods.’”

Obviously, plaintiff's transfer of title to the “Sun-Kist” trade-mark to a third party did not and could not enlarge

defendant's rights of ownership; the transfer therefore could not be such a changed circumstance as to justify dissolution of the injunction.

Today, as in 1936, the injunction does no more than enforce a subsisting agreement between plaintiff and defendant which defined the limited ownership and scope of defendant's mark. In *United States v. Swift & Co.* (1932) 286 U.S. 106, the Supreme Court held that modification of an injunction which merely enforces a contract into which "experienced business men" entered "with their eyes open" (p. 115) is not permissible. See also *Hughes Tool Co. v. A. F. Spengler Co.* (W.D.Okl. 1947) 73 F.Supp. 156, 157-158.

Coca-Cola Co. v. Standard Bottling Co. (10 Cir. 1943) 138 F.2d 788, relied upon by defendant (Op.Br., p. 9) is not in point. In that case the injunction had been granted on the basis of an original exclusive right to the use of the word "Cola," and modification of the decree was permitted upon a showing that plaintiff had lost such exclusive right in subsequent years. Since there, by reason of changed circumstances, *anyone* could use the word "Cola" the injunction no longer was of any use or advantage because other distributors could freely adopt "Cola" for their soft drinks. That is not this case, where the extent and scope of defendant's ownership of its "Sun-Maid" mark was defined by a separate contract which has the same vitality today as it had when executed.

Defendant attempts to bolster its position by arguing that this Court in its prior decision did not disturb the trial court's original finding of lack of confusing sim-

ilarity in the trade-marks⁴ (Op.Br., pp. 2-3). This Court, while not expressly overturning that finding, necessarily did so by implication when it enforced the 1917 contract, for that contract by its very nature and terms was based on the confusing similarity between the parties' respective trade-marks. This the defendant itself recognizes in conceding that "the contract was based on the alleged confusing similarity of the trademarks" (Op.Br., p. 11).

Defendant's assertions, therefore, are without foundation either in the rulings of this Court or the record now before it.

2. **Dissolution of the injunction would in effect nullify an outstanding contract between plaintiff and defendant, and thereby unfairly deprive plaintiff of the consideration which induced it to enter the contract.**

Equally unfounded are defendant's contentions that plaintiff no longer has an interest in the 1917 contract (Op.Br., pp. 10-11), and that plaintiff, by selling the "Sun-Kist" trade-mark in 1950 while retaining its contract rights, engaged in some undefined "hocus-pocus" which requires dissolution of the injunction (Op.Br., pp. 13-14).

Plaintiff's continued interest in the contract and injunction is manifest. The injunction in effect granted plaintiff specific performance of a contract by which plaintiff and defendant compromised an action involving trade-mark infringement and related issues. Plaintiff

⁴Defendant's argument that the finding was not disturbed and has become the law of the case ignores the fact that, pursuant to the mandate of this Court, the district court vacated its original judgment and, necessarily, the findings on which it was based (R. 8).

agreed to and did withdraw its action against defendant then pending in a New York Federal district court, and agreed to and did permit defendant to use the trade-mark "Sun-Maid" on packages containing raisins or raisin products. Defendant agreed thereafter to confine its use of its mark "Sun-Maid" to raisins and raisin products. The contract is in as full force and effect today as when the injunction issued, and defendant has not yet fully performed its obligations thereunder. If the injunction were dissolved, defendant would be freed of a contractual obligation to fulfill a promise voluntarily given, for which it has already received adequate consideration from plaintiff. See *Hughes Tool Co. v. A. F. Spengler Co.* (W.D. Okl. 1947) 73 F.Supp. 156, *supra*.

In addition to this basic interest that plaintiff retains in the 1917 contract, other considerations reflect the continuing interest of plaintiff in the contract.

Prior to its sale of the "Sun-Kist" mark in 1950, plaintiff had for many decades sold a substantial volume of dried fruits and canned goods under the mark (R. 27). Because of this long association of the "Sun-Kist" mark with plaintiff's products, any act which reflects unfavorably on the mark reflects unfavorably on plaintiff. Plaintiff had the legal right to sell or not to sell its trade-mark and to select, when it decided to sell, the purchaser which it felt most confident would use the mark well. It sold the mark and the "goodwill" attached to it to the purchaser which it had the greatest confidence would use the mark so as not to create any "badwill" toward plaintiff. If the injunction were dissolved and defendant were freed of its contractual obligations, plaintiff would be forced to

assume the risk of acts of defendant which might reflect unfavorably upon plaintiff. Plaintiff should not be forced to assume such risk where an existing contract, approved by this Court, precludes it.

Defendant also argues that the 1917 contract now constitutes an illegal restraint of trade because it binds defendant "not to compete in specified fields," and that such restrictive covenant is no longer ancillary to a "main lawful purpose" of the contract, which purpose, according to defendant, was protection of the mark "Sun-Kist" (Op.Br., pp. 11-12). This argument is untenable for at least two reasons.

Preliminarily, it may be noted that protection of plaintiff's mark was not the sole purpose of the 1917 contract. The contract settled outstanding litigation and other disputes between the parties, and contained numerous provisions having no relation to plaintiff's trade-mark ownership (R. 9-15). And, as heretofore discussed, plaintiff has a substantial, continuing interest in the 1917 contract apart from its ownership of the "Sun-Kist" mark.

But the real point is that, contrary to defendant's assertion (Op.Br., pp. 10, 12), the 1917 contract does *not* prevent defendant from selling its products in any competitive field. The only effect of the agreement is to define defendant's right to use one trade-mark, leaving defendant wholly free to sell whatever products it chooses under any other name or mark to which it is lawfully entitled.

The only case cited by defendant to support its contention that the contract constitutes an illegal restraint of trade is *United States v. Addyston Pipe & Steel Co.*

(6 Cir. 1898) 85 Fed. 271 (Op.Br., p. 11). The *Addyston* case involved a *price-fixing and market-division* agreement among dominant manufacturers supplying about two thirds of the markets where they did the bulk of their business. Neither that case nor any other case revealed by diligent research remotely suggests that the contract in question in any way violates the antitrust laws. Indeed, defendant concedes the legality of the contract when it was entered into because of the confusing similarity of the trade-marks (Op.Br., p. 11), and nothing in the record discloses any change of that circumstance.

The dicta in the *Addyston* case concerning ancillary covenants in restraint of trade discuss only covenants *preventing all subsequent competition* between the agreeing parties (85 Fed. 281-283). The agreement in question patently does not prevent defendant from selling goods in competition with those of plaintiff; there is no evidence in this record that the limitation upon defendant's use of a particular trade-mark has foreclosed it from any market. The legality of contracts which merely limit use of a trade name and do not otherwise restrict competition between the parties is well established.

Guth v. Guth Chocolate Co. (4 Cir. 1915) 224 Fed. 932, affirming (D.Md. 1914) 215 Fed. 750;

Kellogg v. Kellogg Toasted Corn Flake Co. (1940) 212 Mich. 95, 180 N.W. 397, 402;

Frazer v. Frazer Lubricator Co. (1887) 121 Ill. 147, 13 N.E. 639;

Probasco v. Bouyon (1876) 1 Mo.App. 241;

Waukesha H. M. Springs Co. v. Hygeia S. D. Water Co. (7 Cir. 1894) 63 Fed. 438;

Hamilton, Brown Shoe Co. v. Sam B. Wolf Sons Co. (Ct.Cust.&Pat.App. 1930) 39 F.2d 272.

In *Probasco v. Bouyon*, supra, the court granted an injunction restraining defendant Oakes who had sold his trade name, together with a candy manufacturing business, from using the name in connection with a new candy-making venture. The court said (p. 246):

“A court of equity will restrain a breach of contract or of covenant, and to do so in this case will not be against public policy or in restraint of trade. *Oakes may still make and sell candy*, but not under the name the use of which he has for this purpose sold.”

In the *Guth* case, supra, on similar facts, the Fourth Circuit affirmed the granting of an injunction restraining defendant's use of a trade name with which he had voluntarily parted. The court said (p. 934):

“When, in 1909 Guth sold, among other things, ‘the use of the name Guth for the purpose of manufacturing and selling candies under the Guth label,’ he dispossessed himself of the right thereafter to use his name as a trade-mark, and no valid reason appears for not holding him to his obligation. * * * *Stripped of all pretenses, what he really seeks to do is to keep for himself the essential thing he sold, and also keep the price he got for it.* A court of equity may properly prevent such manifest unfairness. *The injunction granted goes no further than to enforce the agreement which Guth actually made in regard to the use of his name, and he cannot justly complain of a decree which compels him to abide by his bargain.*”

Here, as in the *Guth* case, defendant's only real complaint is that the injunction compels it to live up to the bargain by which it is bound; what defendant seeks is to retain the consideration received from plaintiff, and at the same time to obtain an unlimited right to use the "Sun-Maid" mark in violation of the express terms of the contract.

3. Defendant has not shown that the injunction which it seeks to have dissolved is oppressive; rather, defendant seeks by its motion to avoid its contractual obligations enforced by the decree of this Court.

It is established law that an injunctive decree should be modified only upon a clear showing of extreme and unexpected hardship which is actual and existing at the time the motion to modify is made. In *United States v. Swift & Co.* (1932) 286 U.S. 106, the Supreme Court reversed an order of a district court granting modification of a prior decree, and stated the standards governing its determination as follows (p. 119):

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. * * * No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of

grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The rule stated in *Leonardo v. Leonardo* (D.C.Cir. 1944) 145 F.2d 849 and *Gossard Breeding Estates v. Texas Co.* (D.Colo. 1946) 76 F.Supp. 20, relied upon by defendant (Op.Br., pp. 10-11), refers to conditions appropriate to *original issuance* of an injunction, and is without application to the present question of modification of a prior decree duly issued.

Defendant argues that it "is injured and is threatened by greater injury in that it cannot expand the use of its own trade-mark" and that it "is hindered in preventing unauthorized use of its own name Sun-Maid by others on food products" (Op.Br., p. 10). The only "factual support" for this argument in the record are the following general assertions, in the nature of opinions and conclusions, in a single affidavit (R. 17):

"* * * that, in the past, others have *attempted*, to the detriment of defendant, to use the word Sun-Maid or a colorable imitation thereof, on non-raisin food products; that similar instances of such unauthorized use of the name Sun-Maid are *likely to occur in the future*; that in affiant's *opinion* said injunction precludes defendants from taking all necessary preventive steps to stop such unauthorized use of defendant's name in the future."

This is manifestly not a statement of facts which establish actual, present injury sufficient to constitute a prima facie "clear showing of grievous wrong," as re-

quired by the *Swift* case. Furthermore, defendant cites no legal authority to support its assumption that it cannot protect its mark "Sun-Maid." Patently, defendant can enjoin use by others of its mark or of any confusingly similar trade-mark. Nothing in the 1917 contract or the injunction in any way hampers defendants from taking such protective action.

Defendant's request is not that it be relieved from an oppressive injunction as a result of changed conditions, but rather that it be granted relief from the express terms of a contract binding upon it.

Stripped of all pretenses, what defendant really seeks is to have this Court overturn its prior decision in this case. Notwithstanding this Court's clear rulings that defendant was bound by the contract of March 10, 1917, and that defendant had only a limited "right of ownership" in its trade-mark and was not the "owner" of the mark for use with other than raisins and raisin products, defendant, through the device of a motion to dissolve the injunction, seeks to evade the contract and assert greater rights of ownership.

The history of these proceedings is illuminating. Defendant says that it originally acquired the "Sun-Maid" mark through a bankruptcy proceeding (Op.Br., p. 3). In violation of the contract settling its limited ownership rights in the mark (in consideration of which plaintiff's predecessor dismissed an infringement suit challenging use of the "Sun-Maid" mark), defendant subsequently attempted again to expand use of the mark on other than raisin products. This Court by its mandate ordered

that it be permanently enjoined from doing so. Now defendant renews its efforts to encroach on the rights of others by denying the binding effect of the 1917 contract, and claiming rights of ownership beyond those allowed by the decisions of the Court of Customs and Patent Appeals and of this Court. Defendant has failed to show that continued obedience to its contractual obligations and the decree of the court is oppressive or even unfair. On the contrary, it is obvious that defendant is only embarked on a new campaign to grasp greater ownership rights in the mark. This Court should not lend its hand to aid defendant's scheme, which is clearly without merit.

For all the foregoing reasons, it is submitted that defendant has not made a prima facie showing of cause for relief from the injunction required to warrant the granting of leave by this Court to present the motion to dissolve to the district court.

CONCLUSION.

Plaintiff-appellee California Packing Corporation respectfully submits:

1. That this purported appeal from the interlocutory order of the district court should be dismissed;
2. That the order of the district court declining to proceed without leave of this Court, if held to be appealable, should be affirmed; and
3. That, if this proceeding be treated as an application by appellant for leave of this Court to file a motion to dissolve in the district court, such leave should be de-

nied for failure of appellant to make a prima facie showing of cause for dissolution of the injunction.

Dated, San Francisco, California,

July 27, 1956.

Respectfully submitted,

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No. 15,087

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SUN-MAID RAISIN GROWERS OF CALIFORNIA,
a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION,
a Corporation,

Appellee.

REPLY BRIEF FOR APPELLANT SUN-MAID.

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No. 15,087

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SUN-MAID RAISIN GROWERS OF CALIFORNIA,
a Corporation,

Appellant,

vs.

CALIFORNIA PACKING CORPORATION,
a Corporation,

Appellee.

REPLY BRIEF FOR APPELLANT SUN-MAID.

INTRODUCTION.

Plaintiff, in its brief, lays great emphasis on certain technical procedural arguments designed to postpone, apparently for as long as possible, a final determination of the merits of this case.

First, the plaintiff contends that leave of this court should now be obtained and the motion to dissolve the injunction brought again in the District Court. This circuitous and time consuming procedure postponing, perhaps for years, the dissolution of this unconscionable injunction would be oppressive and unfair to defendant and would only aggrandize the unjust en-

richment accruing to plaintiff. The record is complete and no reason appears why this court cannot dispose of the entire matter.

Second, as another dilatory device, plaintiff now suggests that the order of the District Court denying defendant's motion to dissolve the injunction is not appealable and that the appeal should be dismissed and the defendant required to duplicate the prior proceeding in the District Court after leave of this court is obtained to do so. In view of the clear language of Section 1292(1) of Title 28 of the United States Code granting this court appellate jurisdiction over appeals from orders refusing to dissolve injunctions, and other interlocutory orders, this argument has no merit whatsoever.

In this reply brief defendant will therefore consider only briefly the first of the above technical arguments and devote the remainder of this brief to the merits of defendant's motion.

LEAVE OF THIS COURT WAS NOT REQUIRED AS A PREREQUISITE TO BRINGING THE MOTION TO DISSOLVE IN THE DISTRICT COURT.

Plaintiff relies on numerous cases (Plaintiff's Brief, p. 7) to advance its argument that leave of this court was a prerequisite to defendant's bringing the motion to dissolve the injunction in the District Court. However, in none of the cases cited was the fact situation any different when relief from the judgment was

sought in the lower court than it was when the original judgment had been established or approved by the court of appeals.

In the instant case defendant is not showing additional facts *existing at the time the injunction was issued* for the purpose of establishing *error* in this court's decision. Rather, defendant is relying on a fact (abandonment of the trademark SUN-KIST) which, had it existed prior to this suit, would have precluded issuance of the injunction.

Regardless of whether the injunction now sought to be dissolved was approved by this court, the District Court retained jurisdiction to modify "in adaptation to changed conditions", *United States v. Swift & Co.*, 286 U.S. 106; 52 S. Ct. 460 (462) (1932).

As aptly pronounced by Justice Cardozo in the *Swift* case:

"Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

Justice could not have been served in the instant case by requiring this court to consider *new* facts, having no basis in the record, in order to grant permission to defendant to bring the *same* facts before the District Court to obtain dissolution of the injunction. Such circuitous action is the very thing defendant sought to avoid, and it is for this reason that this court is asked to dispose of the entire matter on this

appeal to avoid further unnecessary consideration of the case by the District Court. Plaintiff, however, unjustly benefiting every day the injunction is in force, seeks to interpose procedural obstructions and would further delay a consideration on the merits of defendant's motion by having the matter again remanded to the District Court.

DEFENDANT'S RIGHT TO DISSOLUTION OF INJUNCTION.

In plaintiff's brief (p. 21) it is contended that "Plaintiff's continued interest in the contract and injunction is manifest". However, the authorities uniformly hold that plaintiff has absolutely no legal interest in either the contract or injunction.

Although the subject proceeding appears to have no exact precedent the restrictive covenant contained in the contract of March 10, 1917 is exactly analogous in legal effect to a restrictive covenant by a seller of a business not to compete with the seller's vendee. In other words the agreement "not to compete" in such cases involving the sale of a business is for the protection of the vendee's interest in the business, just as the covenant in this case was for the protection of the SUN-KIST trademark previously owned by plaintiff.

It is defendant's contention that abandonment of the trademark SUN-KIST by plaintiff eliminated all of plaintiff's interest in the 1917 contract and the injunction, just as assignment of the business by the

vendee terminates all of his interest in the restrictive covenant designed to protect such business.

Goldman v. Bootman, 179 App. Div. 767; 167 NYS 196 (1917).

J. L. Davis, Inc. v. Christopher, 122 So. 406 (Ala., 1929).

In the *Goldman* case defendant was restrained by the trial court from engaging in the refrigerating and warehouse business because upon prior sale of his business to plaintiff he had covenanted not to engage in such business for five years.

Before the temporary injunction was issued, it appeared that plaintiff had resold the business involved.

The New York Supreme Court, Appellate Division, reversed, stating:

“We are of opinion that this injunction should not have been granted for the reason that plaintiff had abandoned this business. . . . In view of his abandonment of the business . . . no harm can come to him by the act of the defendant in engaging therein. . . .”

In the *Davis* case plaintiff sought an injunction to enforce a restrictive covenant by its vendor. However, prior to suit plaintiff had assigned the business and good will to another.

In affirming denial of an injunction by the lower court the Supreme Court of Alabama properly held that the goodwill was inseparable from the restrictive covenant and plaintiff had no standing to enforce the covenant. The court said:

“Our judgment is that appellee (covenantor) on the motion to dissolve the injunction sustained his burden to prove the substance of the allegation in his answer that complainant had assigned the rights upon which the complaint is predicated, and therefore . . . the court properly dissolved the injunction.”

Also analogous to the unique facts of the instant case are the cases involving restrictive covenants affecting real property wherein it has been uniformly held that such covenants cannot be enforced except by one who owns an interest affected by the covenant.

In *Los Angeles University v. Swarth*, 107 Fed. 798 (C.C.A. 9th, 1901) plaintiffs sought enforcement of a covenant made for the benefit of adjoining land. However, no present interest in the adjoining land could be shown by them. The Court of Appeals for the Ninth Circuit stated the rule as to the interest requisite to enforcement of such a covenant as follows (p. 804):

“But in such case it is clear that the complainant must show that he has some interest or title in the land to be protected. This right or interest is the very foundation of his action. He must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder.”

In disposing of the *Los Angeles University* case the court said (p. 806):

“But the complainants do not show in their bill, and it is not shown by affidavit or otherwise, that they are now the owners of or have any interest

in any lands in the vicinity of the university buildings or the campus connected therewith, but, on the contrary, it is averred upon information and belief, in one of the affidavits, that the complainants have no such interest. The inference is, therefore, that the complainants are not in any way interested in the benefit arising from the restriction or limitation placed upon the granted estate by the terms of the covenant contained in the deed, and that the complainants will not be damaged by the failure of the defendants to comply with the terms of the covenant. They are therefore not in a position to maintain this action."

Plaintiff California Packing Corporation is in no better position than the plaintiff in the *Los Angeles University* case because it has no present interest in the SUN-KIST trademark for the protection of which the subject covenant was made.

Plaintiff's brief suggests (p. 19) that the restrictive covenant had the effect of circumscribing, perpetually, defendant's ownership of the SUN-MAID trademark. Such is not the case. The restriction of the SUN-MAID trademark agreed to by defendant's predecessor in interest was merely for the benefit of defendant's interest in the SUN-KIST trademark. In the absence of the SUN-KIST trademark no enforcement of this restriction could be had.

Coca-Cola Co. v. Standard Bottling Co., (C.A. 10th, 1943) 138 F. 2nd 788, has been cited by defendant (Opening Brief, p. 9) in support of the rule that injunctions are always subject to modification or dissolution as conditions change. In the *Coca-Cola* case

an injunction had been issued, by consent, against defendant prohibiting use of the word "cola". A reading of the case makes it clear that the only reason for the injunction was to protect the then distinctive trademark "Coca-Cola". However, sixteen years after the injunction was issued defendant successfully sought modification of the injunction in the District Court on the ground that the word "cola" was no longer distinctive. On appeal, the Court of Appeals for the Tenth Circuit affirmed the lower court quoting the *Swift* case as follows:

"It is only necessary to cite *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460, 462, 76 L. Ed. 999, where the court said: 'We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. * * * A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.' "

Plaintiff attempts to distinguish the *Coca-Cola* case on the ground that "the extent and scope of defendant's ownership of its 'SUN-MAID' mark was defined by a separate contract". (Pl. Br. p. 20). In view of the fact that a consent decree has the same force and effect as a contract between the parties there is no merit in plaintiff's contention. Even if the injunction in the *Coca-Cola* case had been based on a separate contract the result would have been the same.

Plaintiff further states (Pl. Br. p. 20) that the 1917 contract "has the same vitality today as it had when executed". This is clearly not the case because plain-

tiff presently would have no standing in a court of law to enforce the contract of 1917 by the rule set forth in the *Goldman* and *Davis* cases. This fact also points up the unjustness of continuing the injunction especially in view of the lack of confusing similarity between the trademarks SUN-MAID and SUN-KIST.

Although plaintiff points out that the contract does not prevent defendant from selling products under an entirely different trademark, this is merely a theoretical consideration and overlooks realities. Unlike the plaintiff corporation, which sells goods under a myriad of different trademarks, defendant's reputation depends almost entirely on the trademark SUN-MAID. As a practical matter, the right to sell goods under any other trademark is of no value to defendant and the result of this is that the injunction almost completely eliminates competition between the parties.

Inasmuch as plaintiff states (Pl. Br. p. 29) that defendant is attempting to avoid "*its* contractual obligations", the equities of this case require emphasis of the fact that the contract of 1917 was not known to the present defendant until after this suit was brought by plaintiff, *California Packing Corporation v. Sun-Maid Raisin Growers*, 81 F. 2nd 674 (676).

CONCLUSION.

Disregarding the technical procedural matters injected into this proceeding by plaintiff, defendant's request for relief from continued enforcement of

the injunction is clearly justified for the following reasons:

1. The contract of 1917 entered into by the predecessor of defendant and of which the present defendant had no knowledge when it acquired the predecessor's assets, was not enforceable after abandonment of the SUN-KIST trademark by plaintiff.

2. The twenty-year-old injunction now sought to be dissolved is based on an unenforceable contract and results in an inequitable hardship on defendant without any corresponding legal benefit accruing to plaintiff.

3. Plaintiff has no standing in this court because it was merely the beneficiary under a restrictive covenant designed to protect a trademark in which it has no present interest.

4. Having sold the trademark SUN-KIST and its associated goodwill for \$1,250,000.00, plaintiff cannot now lay claim to such goodwill, nor can it take advantage of a covenant made only for the benefit of the trademark and such goodwill.

Dated, San Francisco, California,
August 15, 1956.

Respectfully submitted,

BOYKEN, MOHLER & WOOD,
GORDON WOOD,

*Attorneys for Appellant
Sun-Maid Raisin Growers
of California.*

No. 15088

**United States
Court of Appeals**
for the Ninth Circuit

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

JAN 10 1957

PAUL P. O'BRIEN, CLERK

No. 15088

United States
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BARBARA KARRELL,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Appellee.

In the United States District Court, Southern
District of California, Central Division

No. CR-20365

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BARBARA KARRELL,

Defendant.

AGREED STATEMENT UNDER RULE 76

It Is Hereby Agreed by and Between Barbara Karrell, Appellant, and the United States of America, Appellee, for the purposes of an agreed statement under Rule 76 of the Rules of Civil Procedure, that this statement and its exhibits shall constitute the entire record on appeal herein. It is stipulated that Exhibit "A" is a true copy of the Judgment appealed from, that Exhibit "B" is a true copy of the Findings of Fact and Conclusions of Law thereon, that Exhibit "C" is a true copy of the Notice of Appeal and that Exhibit "D" is a designation of the Points which will be briefed and argued by the Appellant.

It Is Further Agreed that no designation of record need be made under Rule 75(a) of the Rules exhibits shall by this reference become a portion of of Civil Procedure, and that each of the aforesaid

this agreed statement as though set forth herein at length.

.....,
 ERNEST J. ZACK,
 Attorney for Barbara Karrell.

.....,
 Assistant United States At-
 torney.

Order

The above statement conforms to the truth, will be sufficient to present the questions raised by this appeal, and is hereby approved and certified to the Court of Appeals as the record on appeal. Time for the docketing of this record in the Court of Appeals is hereby extended to and including April 9, 1956.

Dated: April 3, 1956.

WM. C. MATHES,
 Judge.

EXHIBIT A

[Title of District Court and Cause.]

ORDER

The parties having stipulated that the above motion be heard this date at San Francisco, and the motion having been heard and submitted for deci-

sion, it is now ordered that the motion is hereby denied this 24th day of January, 1956.

24th day of January, 1956.

WILLIAM C. MATHES,
United States District Judge.

Filed January 24, 1956, at 4:47 p.m.

EXHIBIT B

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preamble

This Court on January 24, 1956, entered its order denying a motion of defendant Barbara Karrell to set aside the judgment of conviction herein under Section 2255, Title 28, U.S.C.A. The Court hereby makes its Findings of Fact and Conclusions of Law as to the matters heard and determined upon said motion.

Findings of Fact

I.

That Barbara Karrell was convicted under six counts of an indictment dated October 27, 1948, in United States of America vs. Barbara Karrell, No.

CR-20365. That trial of said action was on January 12th, 13th, 14th, 18th and 19th, 1949, in this Court before the undersigned, and judgment on such conviction was entered on February 25, 1949.

II.

That all of the offenses involved were misdemeanors. That Barbara Karrell was sentenced to one year on each of the six counts and to pay a \$1,000.00 fine on each of same. That such one-year periods were to run concurrently. That all of such sentence was suspended and Barbara Karrell was placed on probation for a period of five years under the usual conditions, and under the further condition that Barbara Karrell make restitution to veterans as shown by the judgment of the Court dated February 16, 1951. That each of said counts under which Barbara Karrell was convicted were alleged offenses against the United States under Section 697 and 715 of Title 38, U.S.C.A. That the language of all of said counts were the same with the exception of the names, dates of events and description of property and amounts involved.

III.

That said judgment of conviction was appealed to the Court of Appeals for the Ninth Circuit and affirmed in 181 F. 2d 981, with modification of the judgment in respects not material to the making or decision of the within motion. That a Petition for Certiorari in the United States Supreme Court was denied and the Mandate of the Court of Appeals

was spread on the record of this Court on January 24, 1951.

IV.

That Barbara Karrell has not been convicted of any other criminal offense, State or Federal, except the within offenses. That while she failed to pay the fine and make restitution theretofore ordered by the Court, it appeared to the Court that said failure was not wilful or intentional.

V.

That by virtue of the judgment of probation for five years, defendant Barbara Karrell was in custody of the United States Probation Officer for the Southern District of California and subject to the order of this Court. That Barbara Karrell was in custody at the time of the hearing of this order and at the time of the denial thereof.

VI.

That as a result of, and after the within conviction, defendant Karrell lost her California Real Estate License which was revoked by the California Real Estate Commissioner. That the decision of the California Real Estate Commissioner was affirmed in *Karrell v. Watson*, Real Estate Commissioner, 116 C. A. 2d 269, 254, P. 2d 653 (1953).

VII.

That defendant Karrell was unable to bring a proceeding under Section 2255 prior to January 24, 1956, because of lack of funds. That her delay in

bringing such motion was caused by financial reasons.

Conclusions of Law

I.

On January 24, 1956, defendant Barbara Karrell was in the custody of the United States Probation Officer for the Southern District of California, within the meaning of Section 2255, Title 28, U.S.C.A.

II.

That defendant Barbara Karrell could not have been convicted of any other Federal offense or offenses under the facts alleged in the various counts in the indictment.

III.

That the motion by defendant Barbara Karrell to set aside her conviction is based upon her assertion that the Court did not have jurisdiction to try the offenses alleged in the indictment, or to impose judgment of confinement thereon, for the reason that Sections 697 and 715 of Title 38, U.S.C.A., as set forth in the indictment do not allege a Federal offense.

IV.

Whatever view this Court might entertain as a matter of first impression, the matter of the sufficiency of the facts alleged in the indictment to state an offense under the laws of the United States was before the Court of Appeals and this Court

is bound by its decision thereon in *Karrell vs. United States*, 181 F. 2d 981.

Dated: March 22, 1956.

WILLIAM C. MATHES,
Judge.

Approved as to form:

THOMAS LUDLOW,
Assistant United States At-
torney.

EXHIBIT C

[Title of District Court and Cause.]

NOTICE OF APPEAL

Barbara Karrell,
(Appellant)
9973 Durant Drive,
Beverly Hills, California.

Ernest J. Zack, Esq.,
(Appellant's Attorney)
621 South Spring Street,
Los Angeles 14, California.

Offense: Six counts of violation of Sections 697
and 715 of Title 38 U.S.C.A.

On January 24, 1956, defendant, Barbara Karrell, made a motion to vacate the judgment of conviction herein under the provisions of Section 2255

of Title 28 United States Code. Such motion was heard before the Honorable William C. Mathes and an order made denying same on that date.

Appellant, Barbara Karrell, is now on probation granted by the court under the terms of the original judgment of conviction made and entered on February 25, 1949.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: January 24, 1956.

/s/ BARBARA KARRELL.

/s/ ERNEST J. ZACK,

Attorney for Barbara Karrell.

Filed January 24, 1956, as of 4:48 p.m.

EXHIBIT D

[Title of District Court and Cause.]

STATEMENT OF APPELLANT'S POINTS

I.

The District Court Had No Jurisdiction to
Render the Judgment of Conviction

A. Federal Courts Have No Common Law
Criminal Jurisdiction.

B. Federal Statutes Define Crimes Are to Be
Strictly Construed.

C. The Acts Charged in the Indictment Do Not Constitute Allegations of Violations of the Laws of the United States.

D. The Decisional Law Analyzing the Effect of Sections 697 and 715, Title 38, U.S.C.A., Has Not Determined the Point Raised by This Motion.

II.

The District Court Had Power to Vacate
the Judgment of Conviction

A. The Relation Between Section 2255, Title 28, U.S.C.A., and Habeas Corpus.

B. Res Judicata Does Not Apply to Proceedings Under Section 2255, Title 38, U.S.C.A.

C. The Doctrine of the "Law of the Case" Does Not Apply.

D. Miss Karrell was "In Custody" Within the Meaning of Section 2255.

E. Miss Karrell's Right to Have the Conviction Vacated Has Not Been Barred by the Lapse of Time.

III.

The Matter Is Not Moot

IV.

The Court of Appeals Has Jurisdiction to Review a Judgment by the District Court Denying a Motion Under Section 2255, Title 28, U.S.C.A., to Set Aside a Judgment of Conviction.

[Endorsed]: Filed April 3, 1956.

[Endorsed]: No. 15088. United States Court of Appeals for the Ninth Circuit. Barbara Karrell, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15088

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER

Upon Motion to Dismiss Appeal as Moot
Before Stephens, Pope and Fee, Circuit Judges.

The motion of the appellee to dismiss the appeal as moot is denied without prejudice to the right of the appellee to renew the motion at the time of the hearing of the case upon the merits. If the motion is renewed, counsel are invited to discuss the question whether the motion in the District Court, purportedly filed pursuant to § 2255 of Title 28, U.S.C.A., may, upon such appeal or for the purposes of such a motion, be considered to be a proceeding in the nature of coram nobis within the meaning of the decision in *United States v. Morgan*, 346 U.S. 502.

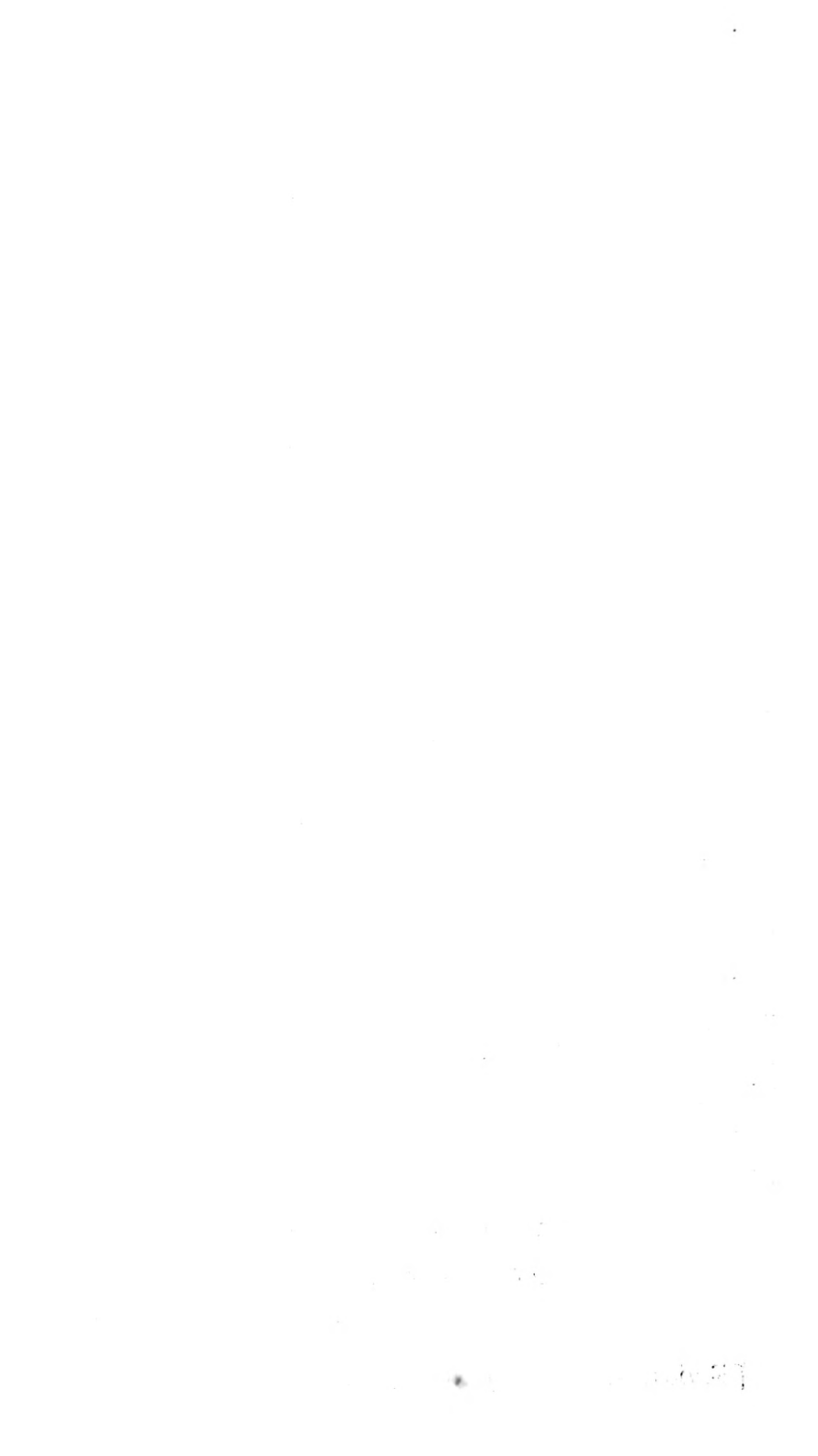
Judge Stephens took no part in the consideration of the motion or the making of this order.

/s/ WALTER L. POPE,

/s/ JAMES ALGER FEE,

United States Circuit Judges.

[Endorsed]: Filed November 27, 1956.



No. 15088
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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LOUIS LEE ABBOTT,
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FILED

MAR 26 1957

PAUL P. O'BRIEN, CLERK



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No. 15088

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA KARRELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Jurisdictional Statement.

The basic jurisdiction of the District Court is founded upon Title 18, U. S. C. A., Section 3231 (June 25, 1948, c. 645, 62 Stat. 826) and initially arose in this case by reason of a violation of Title 38, U. S. C. A., Section 697 (June 22, 1944, c. 268, Title VI, par. 1500, 58 Stat. 300; July 26, 1947, c. 343, Title II, par. 205(a), 61 Stat. 501; April 3, 1948, c. 170, par. 5, 62 Stat. 160; 1953 *re* Org Plan No. 1, pars. 5, 8, effective April 11, 1953, 18 F. R. 2053, 67 Stat. 631), and Section 715 (March 20, 1933, c. 3, Title I, par. 15, 48 Stat. 11). Probation was granted under Title 18, U. S. C. A., Section 3651 (June 25, 1948, c. 645, 62 Stat. 842) and a petition to set aside the judgment was made by appellant under Title 28, U. S. C. A., Section 2255 (June 25, 1948, c. 646, 62 Stat. 964).

The jurisdiction of this court was invoked under the provisions of Title 28, U. S. C. A., Section 1291 (June 25, 1948, c. 646, 62 Stat. 929) and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended Dec. 27, 1948, effective Jan. 1, 1949).

Statement of the Case.

Appellant Barbara Karrell was convicted after jury trial on eight counts of an indictment charging her with alleged offenses against the United States under Sections 697 and 715 of Title 38, U. S. C. A. Generally all these counts involved activities of Miss Karrell which resulted in her knowingly making a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, 38 U. S. C. A., Section 694, *et seq.* The operative facts of this case have been ably set out by appellant in her statement of facts contained in pages 4 to 7 inclusive in her opening brief and are hereby incorporated and approved by the appellee for the purposes of this appeal. Generally it will be noted that as the result of her conviction she was placed upon a five-year period of probation which expired January 24, 1956. On this latter date Miss Karrell noticed a motion to vacate sentence before the Honorable William C. Mathes at San Francisco, California. On the same date the Honorable William Mathes denied the motion to set aside the judgment and notice of appeal from the ruling was thereupon filed. Thereafter, following the filing of notice of appeal, Miss Karrell's period of probation expired during the pendency

of the appeal. A motion by the Government to dismiss the appeal as moot was denied by this Honorable Court on November 27, 1956 without prejudice to a renewal thereof in a hearing of the matter on the merits.

Outline of Arguments.

I.

IT IS SETTLED BY THE DECIDED CASES THAT THE APPELLANT WAS CORRECTLY CHARGED IN THE INDICTMENT WITH A VIOLATION OF THE LAWS OF THE UNITED STATES.

II.

APPELLANT'S PETITION CANNOT BE ENTERTAINED AS A PETITION FOR A WRIT OF CORAM NOBIS.

III.

APPELLANT'S STATUS AS A PROBATIONER DOES NOT ENTITLE HER TO RELIEF UNDER TITLE 18, U. S. C. A., 2255, AS A "PRISONER IN CUSTODY".

IV.

APPELLANT CANNOT MAINTAIN THE INSTANT APPEAL INASMUCH AS IT HAS BECOME MOOT.

ARGUMENTS.

I.

It Is Settled by the Decided Cases That Appellant Was Correctly Charged in the Indictment With a Violation of the Laws of the United States.

Appellant contends that the acts charged in the indictment did not constitute allegations of violations of the laws of the United States. Some background of the sections in question may prove helpful by way of illustration.

In 1933 certain statutes were passed providing for compensation pension and general veterans' relief. Penal provisions applicable for violations of these sections were contained upon codification in Sections 712, 713, 714 and 715 of Title 38, United States Code. More specifically, Section 712 applied generally to false affidavits concerning claims, Section 713 applied to accepting payments of pensions after the right thereto had ceased, Section 714 applied to receiving a pension when a person was not entitled thereto, and Section 715 applied generally to the making or conspiring to be made false statements concerning any claims. Following World War II public demand for veterans' benefits legislation resulted in the Servicemen's Readjustment Act of 1944 which in its codified form is presently contained in Title 38, United States Code, Section 694 *et seq.* In regard to penal provisions for violation of the new legislation, rather than enact concurrent legislation, Congress incorporated certain of the penal provisions of the prior legislation, and applied them equally to similar violations under the new laws. This

incorporation was worked by Section 697 of Title 38, U. S. C. A. which provides in pertinent part:

“(a) Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 701, 702, 703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of Sections 450, 451, 454a and 556a of this title, shall be for application under this chapter . . . June 22, 1944, c. 268, Title VI, paragraph 1500, 58 Stat. 300; July 26, 1947, c. 343, Title II, paragraph 205a, 61 Stat. 501; April 3, 1948, c. 170, paragraph 5, 62 Stat. 160; 1953 *re* Ord Plan No. 1, paragraphs 5, 8, effective April 11, 1953, 18 F. R. 2053, 67 Stat. 631.)”

It can thus be seen by this above quoted section that certain of the penal provisions of the old law (1933 law) are governing to applicable violations under the new law (1944 law).

Appellant Karrell was convicted under Sections 715 and 697 (of Title 38, U. S. C. A.). As set out in Appellant's Opening Brief at page 4, Count Four of the indictment is illustrative of the offenses charged and reads as follows:

“On or about October 22, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Barbara Karrell, did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, 38 U. S. C. A., Section 694 *et seq.*, in that defendant did cause the Bank of America National Trust and Savings Association, 1358 Third Street, Santa Monica, California Branch, to certify in a home loan report presented to the United States

Veterans' Administration that the price paid by Philip Bentivegna, a veteran of World War II, for the purchase of a residential lot of 4907 Beloit Avenue, Los Angeles, California, as to which a loan guarantee is sought from the Government of the United States, was \$1,550.00, and that the price paid by said veteran for such property did not exceed the reasonable value thereof of \$1,650.00 as determined by a proper appraisal dated January 24, 1946, made by Robert E. Gilliland, an appraiser designated by the Administrator of Veterans Affairs; whereas as defendant well knew and caused to be concealed from said bank and Veterans Administration, a total price demanded and received by the defendant from said veteran for such property was \$2,150 and did exceed the reasonable value thereof as determined by a proper appraisal."

The indictment therefore charges a violation of Section 715, Title 38, U. S. C. A., as incorporated by Section 697, Title 38, U. S. C. A.

It is alleged by appellant that the District Court had no jurisdiction to render the judgment of conviction inasmuch as the acts charged in the indictment do not constitute allegations of violations of the laws of the United States. In support of this position appellant argues that Section 697 incorporates Section 715 and inasmuch as Section 715 by its terms is limited to violations under Sections 701, 702, 703, 704, 705, 706, 707-710, 712, 715, 717, 718, 720 and 721, it cannot apply to violations under Section 697 which is not within the enumerated sections contained therein. Basic to this view is the assumption contained at page 10 of appellant's brief that

all the terms of Section 715 are incorporated in Section 697. By this bit of legal legerdemainistic reasoning appellant concludes that decisions of this Honorable Court in this and other cases and decisions of other courts on the same subject are distinguishable. Whether the result would follow if appellant's premise were correct is perhaps arguable, but doubtful. It is the position of the appellee, United States of America, that appellant makes an unwarranted assumption in a basic interpretation of the statutes involved. This is apparent from a careful reading of Section 697 (*supra*) that "the administrative definitive and *penal provisions* under Sections . . . 715 . . . shall be applicable under this chapter." In order to give effect to the admitted intention of Congress (App. Br. p. 12) a careful reading of the above quoted statute reveals that it is not Section 715 in its entirety with the contained restrictions which was intended to be incorporated. Section 697 clearly states that rather than the section as a whole (715) it is only the penal provisions which are intended to be incorporated. Such an interpretation is the obvious import of the decisions in this court in other cases construing these sections. As stated by this Honorable Court in *Young v. United States* (9th Cir., 1949), 178 F. 2d 78:

"Incorporation of statutes by reference has been a common practice in federal legislation, and the adoption of an earlier statute by reference makes it as much a part of the latter statute as though it had been incorporated at full length.

"That Congress intended to bring into the Servicemen's Readjustment Act of 1944, *the criminal penal-*

ties of Section 715, seems apparent in the light of the legislative history of the Act.”

Again, in the appeal on the merits in the instant case formerly before this Court, a similar interpretation was adopted when Judge Stephens, speaking for the Court, stated in *Karrell v. United States* (9th Cir., 1950), 181 F. 2d 981, 984:

“A similar indictment before this Court was held to charge an offense. In *Young v. United States* (9th Cir., 1949), 178 F. 2d 78, 80, certiorari denied (1950), 70 S. Ct. 573, we decided a like point. It was there urged ‘that Congress had failed to denounce the act charged in the indictment as a crime, and even if an attempt to accomplish this purpose is manifest, such intention is not expressed in clear and unequivocal language.’ We ruled that Congress intended to incorporate by reference *the penal provisions of Section 715 of Title 38, U. S. C. A.*, into the Servicemen’s Readjustment Act of 1944, 38 U. S. C. A., Section 694, *et seq.*, and that such purpose was accomplished by Section 697 of Title 38, U. S. C. A.”

See also cases cited by appellant.

In view of the premises, not only has the question presented in the instant appeal been litigated adversely to appellant’s contentions by this Honorable Court, but additionally it has been so adversely settled in the same case in the appeal upon the merits. Accordingly, the Government takes the position that Section 697 (*supra*) works a valid incorporation of the *penal provisions* of Section 715 (*supra*) and the limitations included in 715 have no application by way of divesting operation of Section 715 to violations under the Servicemen’s Readjustment Act of 1944.

II.

Appellant's Petition Cannot Be Entertained as a Petition for a Writ of Coram Nobis.

Subsequent to the filing of the notice of appeal and during the pendency of the appeal, the United States, appellee herein, made motion to this Honorable Court to dismiss the instant appeal as moot. By order of November 27, 1956, this motion was denied without prejudice to renewal at the time of hearing on the merits. In making this order, this Honorable Court invited counsel to discuss the question,

“Whether the motion in the district court purportedly filed pursuant to Section 2255 of Title 28, U. S. C. A. may, upon such appeal or for the purpose of such a motion, be considered to be a proceeding in the nature of *coram nobis* within the meaning of the decision in *United States v. Morgan*, 346 U. S. 502.”

This portion of appellee's argument is in response to such invitation.

Relying upon *United States v. Morgan, supra*, appellant takes the position that the

“Writ of *Coram Nobis* still exists, and that it is not necessary that a prisoner be in custody under *coram nobis* to obtain review, where his conviction was based upon an error of fundamental or constitutional sort.”

Appellant then seeks to bring her present motion under Section 2255 of Title 28, United States Code, within the purview of *coram nobis* as outlined in the *Morgan* case. In so doing appellant ignores that in its basic function a writ of *coram nobis* lies solely to view errors of fact extrinsic of the record and which were not brought to the

Court's attention through no failure of the petitioner. It is readily discernible that inasmuch as appellant's attempt to secure relief under Section 2255, *supra*, is based upon a pure question of law (namely a question of statutory construction), remedies in the nature of a writ of *coram nobis* are not available to her. As is stated in 24 C. J. S. p. 151, Criminal Law, Section 1606:

"The writ of error *coram nobis*, or *coram vobis*, is not available to correct errors of law, and therefore does not lie to set aside a conviction because the information does not state a public offense . . ."

Any attempt upon the part of appellant to question the sufficiency of the indictment in the instant case by a motion in the nature of a writ of *coram nobis* must accordingly fail. In *State v. Woodward* (1945), 160 P. 2d 432, the Court said:

"A writ of *coram nobis*, where available, seeks to obtain a review of a judgment on the ground that certain mistakes of *fact* have occurred which were unknown to the Court and to the parties affected, and that, but for such mistakes, the judgment would not have been rendered.

31 Am. Jur. on Judgments, Section 802;

State v. Richardson, 291 Mo. 566, 237 South Western 765;

Alexander v. State, 20 Wyo. 241, 123 Pac. 68, Ann. Cas. 1915(a) 1282.

However, for a party to be entitled to this writ, it must appear that the failure to present the facts to the Court was not due to any negligence or fault of the party seeking the writ." (Emphasis added.)

As stated in *In re Dyer* (1948), 193 P. 2d 69-72:

“The writ of error *coram nobis* is issued to correct an error of law that is based upon some issue of fact.

People v. Reid, 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435;

People v. Darcy, 79 Cal. App. 2d 683, 180 Pac. 2d 752;

People v. Dale, 79 Cal. App. 2d 370, 179 Pac. 2d 870.

Whatever may be said about the inception of the writ, the recognized present purpose is to correct an error of fact which was unrecognized prior to the final disposition of the proceeding. It is not intended as a means of revising findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence.

People v. Reid, *supra*;

People v. Mooney, 178 Cal. 525, 174 Pac. 325;

People v. Cabrera, 7 Cal. 2d 11, 59 Pac. 2d 804;

In Re Paiva, 31 Cal. 2d 503, 190 Pac. 2d 604.

To correct an error of fact it is often necessary to modify a legal ruling, order, judgment, or decree, but *it is the fact and not the law that is the subject of change.*” (Emphasis added.)

In *People v. Butterfield* (1940), 99 P. 2d 310, the District Court of Appeal for the Third District of California considered the nature of the writ as follows:

“The writ of *coram nobis* lies to correct *an error of fact, as distinguished from an error of law*, when no statutory remedy for the wrong exists, or when the statutory remedy is inadequate.

People v. Mooney, 178 Cal. 525, 529, 174 Pac. 325;

People v. Reid, 195 Cal. 249, 232 Pac. 457, 36 A. L. R. 1435;

27 Cal. Law Review 228.

“When a defendant is deprived of the right of trial by jury by extrinsic fraud, misrepresentation, coercion, unlawful persuasion, which neither a demurrer nor a motion in arrest of judgment will reach, the writ may lie. *It is also true that when the wrong complained of has been once presented on an appeal from the judgment, the writ will not lie to again review the same matter.*” (Emphasis added.)

The last sentence of the above quoted case is particularly appropriate to the facts of the instant case, inasmuch as the wrong complained of herein has already been presented to this Honorable Court in the appeal upon the merits and decided adversely to appellant’s contentions.

See:

Karrell v. United States (9th Cir., 1950), 181 F. 2d 981.

Peculiarly applicable to the instant case is the following language of the Supreme Court of Missouri, *en banc*, in the case of *City of St. Louis v. Franklin Banck et al.* (1943), 173 S. W. 2d 837, 847:

“Appellants say that is not enough; that the allegation in the condemnation petition was jurisdictional. We need not go into that. It is not an assignment of error based on new facts, but a pure question of law based on patent record facts which cannot be raised by a motion in the nature of a writ of *coram nobis*. So we overrule the assignment of error.”

Likewise, in the instant case Appellant Karrell presents not a question of fact as could be perhaps reached by a

writ of *coram nobis*, but a pure question of law, going as it does to the legal construction of Sections 697 and 715 (both *supra*).

Indeed, even in the *United States v. Morgan* itself (*supra*), the limitation of *coram nobis* to questions of fact is noted. It is stated by the Court at page 507 of the United States Report:

“The writ of *coram nobis* was available at common law to correct errors of *fact*. It was allowed without limitation of time for *facts* that affect the ‘validity and regularity of the judgment’ . . .”
(Emphasis added.)

And in note 9 on the same page we quote from 2 Tidd’s Practice (4th Am. Ed.), 1136-1137, as follows:

“If a judgment in the King’s Bench be erroneous in matter of *fact* only, and not in point of law, it may be reversed in the *same* Court, by a writ of *coram nobis*, or *quae coram nobis resident*; so called from its being founded on the record and process, which are stated in the writ to remain in the Court of the Lord the King, before the King himself, as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgments; for error in fact is not the error of the judges, and reversing it is not reversing their own judgments. So upon a judgment in the King’s Bench, if there be error in the *process*, or through the default of the *clerks*, it may be reversed in the same Court by writ of error *coram nobis*.”

See also, history and function of the writ of *coram nobis*, *United States v. Wright* (D. C. Ed., Ill., 1944),

56 Fed. Supp. 489, 492; *People v. Mooney* (1918, Cal.), 174 Pac. 325, cited with approval by this Honorable Court in *Audette v. United States* (9th Cir., 1938), 99 F. 2d 113. Additionally, see cases collected at page 63 in the syllabus of the *United States v. Myer*, 235 U. S. 55.

From the foregoing it is apparent that the writ of *coram nobis* lies to correct only errors of extrinsic fact, and will not lie to correct errors of law. More particularly, it will not lie to test the sufficiency of an indictment. Appellant must therefore fail in her effort to seek relief by writ of *coram nobis* where her petition is founded upon a pure question of law involving statutory interpretation. Accordingly, it is the position of the Government that in bringing her petition under Section 2255 of Title 28, U. S. C. A., appellant must be governed by the rules applicable to *habeas corpus* and its ancillary statute, 28 U. S. C. A., Section 2255, and not by any rules applicable to the common law writ of error *coram nobis*.

III.

Appellant's Status as a Probationer Does Not Entitle Her to Relief Under Title 18 U. S. C. A. 2225 as a "Prisoner in Custody."

Appellant's motion in the Court below to vacate her sentence was brought under 28 U. S. C. A. 2255, which provides in applicable part:

"A prisoner in custody under sentence of a Court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the Court was without jurisdiction to impose such a sentence, or that the sentence was in excess to the maximum authorized

by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside or correct the sentence.

“A motion for such relief may be made at any time. . . .” (Emphasis added.)

This section was added in the revised judicial code to correct abuses resulting from several Supreme Court decisions enlarging the scope of relief under habeas corpus. Since its passage, it has been established in this and other circuits that the scope of relief under Section 2255 is coterminous with that afforded by habeas corpus.

Crow v. United States (9th Cir., 1950), 186 F. 2d 704;

United States v. Bradford (2nd Cir., 1952), 194 F. 2d 197;

In re Roland (1949), 85 Fed. Supp. 550.

Therefore, it may be said that precedent establishing the nature and scope of habeas corpus is equally applicable to a motion arising under Section 2255. From a consideration of Section 2255 and of 28 U. S. C. A. 2241, the habeas corpus statute, it is apparent that these sections are available solely to persons or prisoners “in custody.” Throughout its history, the distinguishing requirement of the great writ has always been that the person seeking it must be actually and physically restrained of his liberty. Since the function of the writ is to free the petitioner from unlawful detention, once the object is accomplished, whether through bail, action of the writ, release, discharge, parole, or probation, the writ can do no more and the questions presented by it become moot. The afore-said prerequisite of actual detention is expressed throughout the cases of this country and of England.

In *Unversagt v. United States* (9th Cir., 1925), 5 F. 2d 494, 495, this Honorable Court held that where a petitioner was released on bond pending an appeal, the appeal was rendered moot. As stated at page 495:

“The execution and acceptance of the bond preclude the appellant’s right to habeas corpus. He was no longer restrained of his liberty.”

In *Wales v. Whitney* (1885), 114 U. S. 564, Wales was notified of his impending court martial, and was informed, “You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington.” Wale’s petition for a writ of habeas corpus was denied on the ground that he was in no way deprived of his liberty by the above order. The Supreme Court, in discussing the necessity for restraint or imprisonment to predicate habeas corpus, stated at page 571:

“Something more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it. The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition. The officer has the authority to arrest and the power to enforce it. If the party named in the writ resists, or attempts to resist, the officer can summon bystanders to his assistance, and may himself use personal violence. Here the force is imminent and the party is in presence of it. It is physical power which controls him, though not called into demonstrative action.

“It is said in argument that such is the power exercised over the appellant by the order of the Sec-

retary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him, and though it is said that a file of marines or some proper officer could have been sent to arrest and bring him back, this could only be done by another order of the secretary, and would be another arrest and a real imprisonment under another and distinct order. Here would be a real restraint of liberty, quite different from the first. The fear of this latter proceeding, which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his convenience. and in regard to which he exercises his own will."

In the instant case, while the appellant might have been subject to some moral restraint by reason of the terms of her probation, her case falls into the second rather than the first category (*supra*). She was at all times free on probation. She is now free of even this technical restraint. Any force which could have controlled her was inchoate and not immediate. As in the example in the second category (*supra*), no one could have legally interfered with her freedom. It would have taken another order of the Court to revoke her probation before the physical power of control could be called into demonstrative action. While fear of this possibility may or may not have controlled the appellant to a greater or lesser degree within the limits of her probation, such fear was a moral restraint in regard to which she exercised her own will, and was not a restraint imposed by a physical power or control.

In *Dodge's* case, 6 Martin, La. 569, commented upon in *Wales v. Whitney* (*supra*), the petitioner was imprisoned for debt, but was released on bond. He subsequently was granted a writ of habeas corpus. The Supreme Court, in reversing, stated:

"It appears to us that the writ of habeas corpus was improperly resorted to. The appellee was under no physical restraint, and there was no necessity to recur to a Court or a judge to cause any more restraint to cease. The sheriff did not detain him, since he had admitted him to the benefits of the bounds; the doors of the jail were not closed on him, and if he was detained it was not by the sheriff or jailer. If his was a moral restraint, it could not be an illegal one."

Similarly, in *Respublica v. Arnold*, 3 Yeates 263, cited in *Wales v. Whitney* (*supra*), the Court held under the Pennsylvania reenactment of the original Habeas Corpus Act, habeas corpus would not lie for a person already enlarged on bail.

In *Stallings v. Splain* (1920), 253 U. S. 339, it was held that one enlarged on bail is no longer under actual restraint so as to be entitled to the writ of habeas corpus.

In *Sibray v. United States* (3rd Cir., 1911), 185 Fed. 401, the Court of Appeals in reversing the order of the District Court discharging relators on habeas corpus, stated at page 403:

"Admittedly, the relator was not in the custody of one to whom the writ was directed, nor was she restrained of her liberty, except so far as the friendly custody of her bail and the obligation thereunder, that she should be produced when demanded to appear before the Inspector for further hearing, or

for deportation, was such a restraint. The writ of habeas corpus ad subjiciendum, as its name indicates, has no other office than to require the production of the body of one in custody by the person claiming custody thereof, before a court of competent jurisdiction, in order that the cause of such detention in custody may be inquired into. By the giving of the bail bond, the relator had, for the time being, waived the right to this writ. She was no longer in the custody of the Inspector, nor restrained by him of her liberty. If she intended to contest the legality of the proceedings for her deportation, she should have waited until she was again in the custody of the Inspector for further hearing or deportation. The custody complained of must be actual, not constructive, in the sense that word is used by the respondent in his return."

In *United States ex rel., Wallnar v. Tittmore* (7th Cir., 1932), 61 F. 2d 909, the Court stated:

"Before one can successfully seek a writ of habeas corpus, he must be actually restrained."

To the effect that habeas corpus lies only to obtain release from actual restraint, rather than mere moral or constructive restraint, see also:

Johnson v. Hoy (1913), 227 U. S. 45;

Rose v. Washington Times Co. (C. A. D. C., 1928), 23 F. 2d 993;

Weber v. Squire (1942), 315 U. S. 810;

Doss v. Lindsley (D. C. Ed. Ill., 1944), 53 Fed. Supp. 427, 430;

Hawley v. United States (10th Cir., 1952), 194 F. 2d 52;

In re Roland (1949), 85 Fed. Supp. 550;

Roland v. State of Arkansas (8th Cir., 1950),
179 F. 2d 709;

Florentine v. Landon (9th Cir., 1953), 206 F. 2d
870 (concurring opinion);

and for an extensive treatment of a parolee's right to habeas corpus, see: 148 A. L. R. 1240, *et seq.*

The sole case discernible contrary to those above is *MacKenzie v. Barrett* (1957 Cir.), 141 Fed. 964, of which it was said in *In re Roland* (*supra*) at page 555:

"While this case (*MacKenzie*) does in fact so hold, it was decided in 1905 prior to the decisions in *McNally v. Hill*, (*supra*); *Stallings v. Splain*, (*supra*); and *Johnson v. Hoy*, (*supra*), and is out of harmony with the views expressed in those cases. Moreover, *MacKenzie v. Barrett* may well have been overruled by the later decision of the 7th Circuit in *United States ex rel. Wallnar v. Tittmore*, 61 F. 2d 909, 910, wherein (although the *MacKenzie* case was not referred to) habeas corpus was refused one at liberty on bail, and the Court, citing *Stallings v. Splain*, (*supra*), said, 'Before one can successfully seek a writ of habeas corpus he must be actually restrained'." (Emphasis added.)

Problems arising where, as in the instant case, a person seeking remedy under habeas corpus or Section 2255 (*supra*) is at the time of seeking such relief enlarged on probation or parole, stem largely from the conceptualistic notion that a person at large on probation or on parole is in custody to the same extent as a prisoner confined behind the walls of the Federal penitentiary at Alcatraz Island. It is not only in the field of habeas corpus and 2255 (*supra*) that this conceptualistic fiction gives

rise to weighty problems vitally affecting the administration of justice. It is just such a conceptualistic view of the status of probation which gave birth to the problems presented in the case of *Strand v. Schmittroth* (9th Cir., 1956), 233 F. 2d 598; rehearing denied, *Strand v. Schmittroth*, 235 F. 2d 756. Rehearing *en banc* granted and argued November 20, 1956. (*Strand v. Schmittroth* (9th Cir. No. 14733.)) Of interest in this connection are the words of Judge Chambers in his dissent in the first *Schmittroth* case, 233 F. 2d 598, wherein he stated:

“To hold that the Federal District Court was right requires us to embrace a fiction that one who is on probation is in the ‘custody of the law’. When that fiction produces unseemly judicial conflict, as this does, the fiction ought to give way. One can be subject to a court’s orders without being in the full ‘custody of the law’, without having a protective casing of immunity.”

In the light of the premises, it is apparent that as used in Chapter 153 (28 U. S. C. A.) and as specifically used in these two sections (2241 and 2255), “in custody” means an actual restraint rather than mere moral restraint as is the case of appellant Karrell in her status as a probationer. Both sections (2241 and 2255) use the term “prisoner” in referring to the person in “custody” who has the right to claim the benefits of the sections. To give effect to the clear meaning and intent of Congress in enacting the statute it can only be held that Congress meant what it said and that the remedies under these statutes are restricted to a “prisoner” in “custody”, and are not to be indiscriminately extended to persons not prisoners nor in custody but parolees and probationers free and enlarged upon parole or probation.

The precise question of whether one on probation may bring a motion under Section 2255 has been determined adversely to appellant's position in *United States v. Bradford* (2nd Cir., 1952), 194 F. 2d 197. There, petitioner, while on probation, brought a motion under 28 U. S. C. A. 2255. Judge Learned Hand, speaking for the Second Circuit, held that not being in custody the petitioner was in no position to review his conviction either by habeas corpus or by a Section 2255 motion. Of further interest is the case of *United States v. Lavelle* (2nd Cir., 1951), 194 F. 2d 202, wherein the Court stated:

"Before we can reach the merits of the controversy we must determine whether the district court had jurisdiction to entertain the appellant's motion. *United States v. Bradford*, 2nd Cir., 1952, 194 F. 2d 197. The question whether the remedy provided by Section 2255 is available to a convicted defendant who has completely executed his sentence and has been released from custody thereunder had not been decided by this court at the date of the hearing on the appellant's motion. We noted the existence of the question in *United States v. Rockover*, 2nd Cir., 171 F. 2d 423, 425, but did not find it necessary to determine it. It was, however, determined in *United States v. Bradford*, *supra*. In accord with that decision is *Lopez v. United States*, 9th Cir., 186 F. 2d 707, affirming the lower court upon the authority of *Crow v. United States*, 9th Cir., 186 F. 2d 704. Since the appellant was not in custody under the sentence, his motion attacked, the district court lacked jurisdiction to entertain it. Accordingly the order is reversed and the cause remanded with directions to dismiss the motion for lack of jurisdiction."

The case of *Lopez v. United States*, above referred to (9th Cir., 1950, 186 F. 2d 707) is a short *per curiam* order hereinbelow quoted in its entirety:

“This is an appeal from an order denying a motion to vacate a sentence which appellant contends the district court had no jurisdiction to impose. The motion was made pursuant to the provisions of Section 2255, 28 U. S. C. A.

“It was stipulated during the argument of the appeal that the appellant is not in custody under the sentence he is attacking. In fact, the said sentence has been served. Appellant is now in custody under a separate, distinct and unrelated sentence.

“Upon authority of *Crow v. United States*, 9th Cir. 186 F. 2d 704 the judgment is affirmed.”

Crow v. United States (9th Cir., 1950), 186 F. 2d 704, cited in the previous two cases contains the following language at page 706:

“If appellant’s position was sustained, the proceeding under the section could be invoked to set aside sentences served as well as sentences to be served in the future. Since the motion under Section 2255 was designed to provide a direct attack in place of collateral attack under habeas corpus, it was logical to conclude that the intent of Congress was to limit the scope of relief under it to that on habeas corpus. *Relief under habeas corpus is limited to release from present detention.* It is not available to test the legality of threatened detention. It does not lie to secure a judicial decision which, even if determined in the prisoner’s favor, *would not result in his immediate release.*” (Emphasis added.)

Nor can appellant avoid the import of the above decisions by the explanation attempted at page 24 of her brief

wherein she calls attention to the statutory expression that a motion under 2255 can be brought "at any time." In view of what has gone before, it is apparent that such a statement is subject to the necessary limitation that the person bringing the motion be a prisoner in custody at the time the motion is so brought. It is respectfully submitted by the Government that appellant Karrell being on probation lacked the requisite status of a prisoner in custody upon which to predicate a motion under Section 2255.

IV.

Appellant Cannot Maintain the Instant Appeal Inasmuch as It Has Become Moot.

Appellant Karrell was on probation from January 24, 1951, until January 24, 1956 at which time she made the motion the denial of which prompted the instant appeal. Under the cases cited under the previous heading, even during that period, she was not "in custody", so as to entitle her to bring a motion under Section 2255. But even if it be held *arguendo* that a person on probation is sufficiently "in custody" to avail himself of Section 2255, it must be considered that on January 30, 1956 appellant was by order of Court discharged from the custody of the Marshal, thereby terminating her sentence in all respects. From that time forward she has been in no custody, actual or constructive, and despite any severe financial repercussions resulting from her conviction, the question of the legality of her custody has become moot. In this connection it is to be noted that the continuing disabilities, she alleges result from her conviction, are due not to the action of the Court or its officers, but are due solely to the action of an independent board (of realtors) in suspending her realtors license.

When, during the pendency of an appeal, a case becomes moot so there is no longer any case of controversy before the Court, there is a loss of jurisdiction.

United States v. Alaska S. S. Co. (1922), 53 U. S. 113, 116;

United States ex rel. Eisler v. District Director of Immigration & Naturalization of Port of New York (2nd Cir., 1947), 162 F. 2d 408;

Cover v. Schwartz (1943), 133 F. 2d 541;

Selected Products Corp. v. Humphreys, et al. (7th Cir., 1936), 86 F. 2d 821.

The Supreme Court recently stated:

“The established practice of the court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending, our decision on the merits is to reverse or vacate the judgment below and remand with the direction to dismiss. *United States v. Munsingwear, Inc.*, 1950, 340 U. S. 36 and note 2 at page 39. In this connection it is of course established that while Section 2255 (*supra*) provides for remedy in the nature of habeas corpus, like habeas corpus it is in its nature a civil rather than a criminal proceeding even though invoked on behalf of persons charged with and convicted of crime. *Marcado v. United States*, 183 F. 2d 486; *Hayman v. United States*, 342 U. S. 205; *Burgess v. King*, 1942, 8th Cir., 130 F. 2d 761.”

Inasmuch as a writ of habeas corpus or a motion under Section 2255 can ultimately only secure the goal of setting at liberty a person unlawfully held, it is apparent that appellant Karrell, having attained the desired status of liberty, has obtained any and all remedies she could, in

contemplation of law, obtain under these sections. Accordingly it is the position of the Government that the appeal has become moot and should be dismissed.

Conclusion.

Appellant is incorrect in her attempt to negate the incorporation by Congress of the penal provisions of Section 715 of Title 38, U. S. C. A. by the incorporating provisions Section 697 of Title 38, U. S. C. A.

Appellant's contention that the incorporation purports to incorporate the entire section (715) is not borne out by a careful reading of the statute nor of the case law interpreting it. Both statutes and cases clearly indicate that it is not the section as a whole but merely the *penal provisions* thereof which were intended to be incorporated into the Servicemen's Readjustment Act of 1944. Accordingly, any limitations which may be contained within Section 715 as to its applicability to certain enumerated sections are clearly not penal provisions and such limitations are not applicable to the 1944 Act.

Appellant's motion under 2255 (*supra*) goes solely to a pure question of law arising out of statutory interpretation. Her attempts to liken her petition to a writ of *coram nobis* must be unavailing in view of the fact that *coram nobis* lies only for correction of errors of fact extrinsic of the record. Accordingly her remedy, if it exists at all must be by way of 2255 (*supra*) as akin to relief by habeas corpus.

Title 28, U. S. C. A., 2255, is governed by the same authority as is habeas corpus which is codified in 28 U. S. C. A. 2241. It is settled that actual rather than mere moral restraint is a prerequisite to the successful prosecution of a writ of habeas corpus. Karrell being

enlarged upon five years' probation was not in such custody as would entitle her to habeas corpus or to a motion to vacate under Section 2255. In addition, the day after the filing of the motion to vacate, Karrell's probationary period ended and with it all semblance of even the most technical restraint. Thus, the appeal is moot, and when a case becomes moot during the pendency of an appeal, the appeal will be dismissed. In the premises, the Government respectfully urges this Honorable Court that the order of the Honorable William C. Mathes denying appellant's petition to vacate her sentence under Section 2255, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

THOMAS H. LUDLOW, JR.,
Assistant U. S. Attorney,
Attorneys for Appellee, United States of America.



No. 15089

**United States
Court of Appeals
For the Ninth Circuit**

ALEJANDRO CARPENTERO, Also Known as
Alejandro Llanos,

Appellant,

vs.

WILLIAM A. HOGAN, Officer in Charge, Immi-
gration and Naturalization Service, Honolulu,
Hawaii,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Hawaii**

FILED

MAY 24 1956



No. 15089

United States
Court of Appeals
For the Ninth Circuit

ALEJANDRO CARPENTERO, Also Known as
Alejandro Llanos,

Appellant,

vs.

WILLIAM A. HOGAN, Officer in Charge, Immi-
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Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Hawaii**



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Hawaii

No. 1462

ALEJANDRO CARPENTERO, Also Known as
ALEJANDRO LLANOS,

Plaintiff,

vs.

WILLIAM A. HOGAN, Officer in Charge, Immi-
gration and Naturalization Service, Honolulu,
Territory of Hawaii,

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT AND FOR OTHER RELIEF

Comes now plaintiff above named, by Hyman M. Greenstein his attorney, and complaining of defendant above named respectfully alleges and shows as follows:

1. That plaintiff was born in the Philippine Islands on May 3, 1913 and first came to the United States (port of Honolulu) on May 9, 1930, from which time he has continuously maintained his residence in Honolulu.

2. That plaintiff is married to a citizen of the United States, to wit: Salome V. Llanos, and that there are four children born of this marriage, all born within the Territory of Hawaii and citizens of the United States.

3. That defendant is presently in charge of the Honolulu office of the Immigration and Naturaliza-

tion Service, Honolulu, Territory of Hawaii; and as such is the agent and representative of the Commissioner of Immigration and Naturalization, the Attorney General of the United States and the Department of Justice in connection with matters of deportation.

4. That defendant is duly authorized, in his official capacity to carry into effect the provisions of the Immigration and Nationality Act of 1952 (8 USCA 1101 et seq.) and more particularly to execute warrants of deportation issued pursuant to said Act.

5. That on October 20, 1953, there was issued by the District Director, Honolulu District, Immigration and Naturalization Service, a warrant for arrest for deportation of plaintiff on the ground that he had last entered in the United States as a nonimmigrant visitor for business, and had failed to maintain his status.

6. That hearings were duly held before a special inquiry officer of the Immigration and Naturalization Service on November 17, 1953, and December 1, 1953; and on December 3, 1953, said special inquiry officer entered his findings and an order, ordering that plaintiff be deported from the United States on the charge contained in the warrant of arrest.

7. That plaintiff duly perfected an appeal to the Board of Immigration Appeals, which on November 8, 1954, dismissed said appeal.

8. That the aforesaid order is a final order in an

administrative proceeding, to wit: a deportation proceeding, by an administrative agency of the Government of the United States, to wit: The Immigration and Naturalization Service.

9. That plaintiff is informed and believes, and on the basis of such information and belief alleges the fact to be that unless defendant is enjoined and restrained from deporting plaintiff, defendant intends to and will deport plaintiff, or cause the deportation of plaintiff forthwith, or at any early date, from Honolulu to Manila, Philippine Islands, pursuant to said order of deportation, without affording plaintiff an opportunity to request and secure review by this or any court of the said order of deportation as provided by the Administrative Procedure Act.

10. That the jurisdiction of this Court to grant the relief prayed for herein is based upon the Declaratory Judgment Act, Title 28, U.S.C., Sections 2201, 2202, upon the provisions of the Act of June 11, 1946, more specifically known as the "Administrative Procedure Act" (5 U.S.C. Secs. 1001-1011), and particularly under and by virtue of the provisions of Section 10 of the said Act (5 U.S.C. 1009), and this Court has jurisdiction under the provisions of the said Act to enjoin defendant herein from executing and carrying into effect or otherwise acting upon an unlawful and illegal order and warrant of deportation.

11. That plaintiff does not desire to be deported from this country.

12. That plaintiff has exhausted his administrative remedies.

13. Plaintiff admits that he was last admitted into the United States as a "nonimmigrant, visitor for business," but states the fact to be that that in truth, substance and fact he was and still is a bona fide permanent resident of the United States returning to his home and residence in Honolulu, but that through improper advice from United States consular officials he made entry into the United States as aforesaid rather than as a permanent resident re-entering the country as was his right and intention.

14. That the said order for deportation, the findings of fact, conclusions of law, the entire proceedings to deport plaintiff, and all other actions of the Government herein to achieve that purpose are unlawful and illegal in that they deprive plaintiff of his liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that Section 241 (a)(9) of the Immigration and Nationality Act (8 USCA 1251 (a)(9) is improperly and unlawfully applied to plaintiff who at the time of his last entry into the United States as aforesaid was in fact and in substance a bona fide resident of the United States returning to his home and residence and not a nonimmigrant entering the United States for business.

15. That the entire proceedings to deport plaintiff are void and contrary to law in that they are not based upon an order issued by the Attorney

General of the United States as required by Sec. 241 (a) of the Immigration and Nationality Act (8 USCA 1251 (a)).

16. That the entire proceedings to deport plaintiff are null and void and contrary to law in that the said proceedings and said order of deportation do not show affirmatively that the party issuing same had legal authority to issue said order of deportation.

17. That the order for deportation of the plaintiff is void and contrary to law in that there is no legal evidence in the record to sustain a finding other than that the plaintiff is and was a permanent resident of Honolulu, Territory of Hawaii and was not a nonimmigrant visitor for business and hence that plaintiff is not subject to deportation upon the charge set forth in the warrant.

18. That the entire proceedings and order to deport plaintiff are null and void and contrary to law in that there is absolutely no evidence in the record at all as to whether plaintiff failed to maintain his status (as charged in the warrant of arrest for deportation); or that if he did change his status, whether said charge was voluntary or involuntary on his part.

Wherefore, plaintiff prays for judgment:

1. Declaring the order for deportation of the plaintiff null and void and of no effect;

2. Declaring that the order of deportation and the particular sections of the statute upon which it

is based as applied to the plaintiff unconstitutional and void as denying plaintiff of his rights under the Constitution of the United States;

3. Enjoining and restraining the defendant from acting upon said order for deportation of the plaintiff.

4. Pending the final determination of this action, that a preliminary injunction may issue, restraining the defendant, his agents, representative and attorneys from proceeding with the deportation of the plaintiff; and to preserve the status and the rights of the parties, plaintiff prays for a temporary restraining order to the like effect as the preliminary injunction prayed for herein, and for such other and further relief as this Court may deem just and proper.

Dated at Honolulu, Hawaii, this 31st day of January, 1956.

/s/ HYMAN M. GREENSTEIN,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed January 31, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now defendant above named, by Louis B. Blissard, United States Attorney for the District of Hawaii, and Charles B. Dwight III, Assistant United States Attorney for the District of Hawaii,

and in answer to the Complaint filed herein respectfully alleges as follows:

First Defense

Admits the allegations contained in Paragraphs 2, 4, 5, 6, 7, 8 and 12 of the Complaint; denies the allegations contained in Paragraphs 14, 15, 16, 17 and 18 of the Complaint; states that he is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 11 of the Complaint.

Admits the allegations contained in Paragraph 1 of the Complaint, except those allegations which state: "from which time he has continuously maintained his residence in Honolulu," which is denied.

Admits the allegations contained in Paragraph 3, but only to the extent that he is authorized to act under the regulations contained in Title 8, Code of Federal Regulations.

States that the allegations contained in Paragraph 10 are conclusions of law and need be neither denied or admitted.

Admits those allegations of Paragraph 13 which state: "plaintiff admits that he was last admitted into the United States as a non-immigrant visitor for business," and denies the remaining allegations of Paragraph 13.

Admits the allegations of Paragraph 9, except those which state: "without affording plaintiff an opportunity to request and secure review by this or any court of the said order of deportation as provided by the Administrative Procedures Act," which

defendant denies, and alleges that defendant will act in accordance with the law and regulations concerning the deportation of aliens such as the plaintiff and in conformity with the orders of this or any other court which has jurisdiction to review the administrative order of deportation.

Second Defense

In further answer to the Complaint filed herein, the defendant affirmatively alleges as follows:

1. That the plaintiff is an alien, a native and a citizen of the Republic of the Philippines;

2. That the plaintiff last entered the United States at the Port of Honolulu, Territory of Hawaii, on January 28, 1950, and was admitted under Section 3(2) of the Immigration Act of 1924 until June 28, 1950, and was granted an extension of the term of his admission until February 15, 1951;

3. That application for further extension of stay was denied on October 27, 1952;

4. That the Special Inquiry Officer found the plaintiff subject to deportation in that, after admission to the United States as a non-immigrant, to wit, a visitor for business under Section 3(2) of the Immigration Act of 1924, he failed to comply with the conditions of such status.

5. That this finding of the Special Inquiry Officer and his decision ordering deportation were based upon reasonable, substantial and probative evidence.

Wherefore, the defendant prays that the Complaint be dismissed.

Dated: Honolulu, T.H., this 6th day of February, 1956.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,

By /s/ CHARLES B. DWIGHT, III,
Asst. United States Attorney,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 6, 1956.

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Feb. 15—Entering proceedings at hearing on merits of case, Plaintiff's Exhibit No. 1, record file of plaintiff admitted in evidence, case submitted for argument without offer of any further evidence, argument by respective counsel and relief prayed for in complaint denied by the Court.

Judgment entered in favor of defendant and against plaintiff this 15th day of February, A.D. 1956, at 2:30 p.m. McLaughlin, Judge. Respective counsel advised by telephone of entry.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alejandro Carpentero, also known as Alejandro Llanos, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order denying the petition of the plaintiff and entering judgment in behalf of the defendant entered in this action on February 15, 1956.

Dated at Honolulu, Hawaii, this 17th day of February, 1956.

By /s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

[Endorsed]: Filed February 17, 1956.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

The plaintiff having filed notice of appeal from the judgment of this Court entered on February 15, 1956, to the United States Court of Appeals for the Ninth Circuit, hereby desposits with the Clerk of this Court the sum of \$250.00, in United States currency, subject to the orders of this Court as security that said plaintiff appellant shall pay all costs which may be awarded against him on appeal.

Dated at Honolulu, Hawaii, this 28th day of February, 1956.

/s/ HYMAN M. GREENSTEIN,
Attorney for Plaintiff.

Receipt of the sum of \$250.00 in United States Currency acknowledged this 29th day of February, 1956.

/s/ WM. F. THOMPSON, JR.,
Clerk of the United States
District Court.

[Endorsed]: Filed February 29, 1956.

In the United States District Court
for the District of Hawaii

Civil No. 1462

ALEJANDRO CARPENTERO, Also Known as
ALEJANDRO LLANOS,

Plaintiff,

vs.

WILLIAM A. HOGAN, Officer in Charge, Immi-
gration and Naturalization Service, Honolulu,
Territory of Hawaii,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above cause having come on regularly for hearing on February 15, 1956, the Honorable J. Frank McLaughlin presiding without a jury, no jury having been requested, the Plaintiff appearing by his attorneys, Hyman M. Greenstein, Esquire, and the Defendant appearing by his attorneys, Louis B. Blissard, United States Attorney for the

District of Hawaii, and Charles B. Dwight, III, Assistant United States Attorney for the District of Hawaii, the said cause having been heard on February 15, 1956, and the evidence having been introduced on behalf of the Plaintiff and Defendant, and the Court having considered the same, and having heard the arguments of counsel and being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

The Plaintiff is an alien, a native and citizen of the Republic of the Philippines.

II.

The Plaintiff last entered the United States at the port of Honolulu, Territory of Hawaii, on January 28, 1950, and was admitted under Section 3(2) of the Immigration Act of 1924 until June 28, 1950, and was granted an extension of the term of his admission until February 15, 1951.

III.

Application for further extension of stay was denied on October 27, 1952.

IV.

The Special Inquiry Officer found Plaintiff to be subject to deportation on the ground that after admission to the United States as a non-immigrant, to wit, a visitor for business under Section 3(2) of the Immigration Act of 1924, he failed to comply with the conditions of such status.

V.

The findings of the Special Inquiry Officer and his decision ordering deportation were based upon reasonable, substantial and probative evidence.

Conclusions of Law

I.

This Court has jurisdiction to hear and determine the within cause under Title 5, United States Code, Section 1009, and Title 28, United States Code, Sections 2201 and 2202.

II.

Plaintiff had the status of a visitor for business under Section 3(2) of the Immigration Act of 1924 when he entered the United States on January 28, 1950, and his deportation as a visitor who has not maintained his status is in accordance with law.

III.

A Special Inquiry Officer has the power to order deportation of an alien, both by law and the regulations promulgated thereunder.

IV.

The expiration of Plaintiff's extension of stay on February 15, 1951, violated Plaintiff's status as a business visitor and consequently made him subject to deportation.

Let judgment in favor of the Defendant and against the Plaintiff be entered accordingly.

Dated: Honolulu, T.H., this 2d day of March, 1956.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District
Court.

Receipt of copy acknowledged.

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in finding and concluding that plaintiff was a visitor for business upon his last entry into the United States.
2. The court erred in finding and concluding that plaintiff was a visitor for business who failed to maintain his status as such.
3. The court erred in failing to find and conclude that at the time of plaintiff's last entry into the United States plaintiff was in fact an alien who had previously been lawfully admitted for permanent residence and had not lost that status as a permanent resident of the United States.
4. The court erred in failing to find and conclude that plaintiff's visit to the Philippines was of a temporary nature and did not change his status.

5. The court erred in failing to find and conclude that plaintiff was a returning resident rather than a visitor for business upon his last entry into the United States.

6. The court erred in ruling that plaintiff was subject to deportation under Section 3(2) of the Immigration Act of 1924 as a business visitor who did not maintain his status.

Dated at Honolulu, T.H., this 20th day of March, 1956.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1956.

In the United States District Court for the
District of Hawaii

Civil No. 1462

ALEJANDRO CARPENTERO, Also Known as
Alejandro Llanos,

Plaintiff,

vs.

WILLIAM A. HOGAN, Officer in Charge, Immi-
gration and Naturalization Service, Territory of
Hawaii,

Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on February 15,
1956, at 10:00 o'clock a.m.

Before Hon. J. Frank McLaughlin, Judge.

Appearances:

HYMAN M. GREENSTEIN, ESQ.,

Appearing for the Plaintiff;

CHARLES B. DWIGHT III, ESQ.,

Assistant U. S. Attorney,

Appearing for the Defendant.

Proceedings

The Clerk: Civil No. 1462, Alejandro Carpentero,
also known as Alejandro Llanos, Plaintiff, versus

William A. Hogan, Officer in Charge, Immigration and Naturalization Service, Territory of Hawaii; case called for trial.

The Court: Is that the purpose, gentlemen, that the case be tried?

Mr. Dwight: Well, I think the purpose is judicial review. It amounts to a trial. It is a hearing on the merits.

The Court: A hearing on the merits?

Mr. Dwight: A hearing on the merits, yes.

The Court: I was a little confused as to what was coming up. I notice you filed your answer within 60 days and long prior to the expiration of 60 days, thus putting the matter at issue. But it could have been that some injunctive relief was being applied for by motion, for that was contained in the numerous prayers that are found at the end of the petition. But it is clear in everyone's mind that this is a hearing on the merits, the case being at issue?

Mr. Greenstein: That is correct, your Honor.

The Court: Are you both ready?

Mr. Dwight: Ready.

The Court: Now, Mr. Greenstein——

Mr. Greenstein: May we at the outset say that this, of course, is a supplementary case following the prior habeas corpus which I filed in behalf of the same party, being in the records of this Court, Habeas Corpus No. 356. That particular matter was rendered moot. We filed notice of appeal and the matter was rendered moot by the man being retaken and there being an actual change of physical custody. Following up——

The Court: Well, excuse me. For the record, the retake was in connection with what?

Mr. Greenstein: As I understand it, the retake was in connection with, I presume, a violation of conditions of parole by failing to report to the order for deportation.

The Court: Well, I don't know what it was, but all I want you to at least indicate on the record is that he was retaken in connection with a criminal case.

Mr. Greenstein: That is correct. So that actually the man is now in custody of the warden of Oahu Prison, the Attorney General, on a prior criminal conviction. On the matters which we are considering here today, in order that the record may be complete, I will respectfully request that the exhibit which was entered in the habeas corpus case, which was the record before the Immigration Department, be made an exhibit in behalf of the petitioner in this case.

The Court: Any objection?

Mr. Dwight: No objection.

The Court: Very well, the same may be an exhibit in this case, borrowed from the habeas corpus case. That may be labeled in this case as——

The Clerk: Plaintiff's Exhibit 1.

(The exhibit referred to was received in evidence as Plaintiff's Exhibit 1.)

Mr. Greenstein: Actually with that exhibit in evidence, it will constitute all of the evidence as such which we would have to present in any event because

it is rather complete. Now, the points we are trying to urge in this petition——

The Court: Wait a minute. Are you moving to argument now? If your evidence is finished, let's see if the government has anything to put in.

Mr. Greenstein: I have no further evidence to present.

The Court: Do you have any evidence?

Mr. Dwight: No, your Honor, we have no evidence to present other than the record.

The Court: All right. We are ready for argument? Are you both ready to be heard in argument?

Mr. Dwight: Yes, your Honor.

The Court: All right.

(Arguments presented by Counsel.)

The Court: We went over this ground pretty thoroughly at the time of the habeas corpus proceeding and very little, if anything, has been added. I have reviewed the record of the Immigration authorities and I have considered the questions of law raised by the pleadings, and I do not find that the plaintiff is entitled to the relief prayed for on any one of the grounds alleged.

Therefore, the petition is denied and judgment to that effect may enter forthwith. So that puts you, as you probably anticipated, back on the road to the Ninth Circuit.

Mr. Greenstein: That is correct.

The Court: All right.

Reporter's Certificate

I, Albert Grain, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 1462, Alejandro Carpentero, Plaintiff, vs. William A. Hogan, Officer in Charge, Immigration Service, Territory of Hawaii, Defendant, reported by me on February 15, 1956, and subsequently transcribed by me.

March 22nd, 1956.

/s/ ALBERT GRAIN,
Official Court Reporter.

[Endorsed]: Filed March 22nd, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 33 consists of a statement of the names and addresses of the attorneys of record and of the various pleadings, exhibits and transcript of proceedings as hereinbelow listed and indicated:

Originals

Complaint for Declaratory Judgment and for Other Relief.

Answer.

Notice of Appeal.

Bond for Costs on Appeal.

Findings of Fact and Conclusions of Law.

Statement of Points on Which Appellant Intends
to Rely.

Designation of Contents of Record on Appeal.

Transcript of Proceedings.

Counter Designation of Record on Appeal.

Plaintiff's Exhibit No. 1.

I further certify that included in said record on
appeal is a copy of the Docket Entries of February
15, 1956.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court, this
23rd day of March, 1956.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii.

[Endorsed]: No. 15089. United States Court of
Appeals for the Ninth Circuit. Alejandro Carpen-
tero, also known as Alejandro Llanos, Appellant,
vs. William A. Hogan, Officer in Charge, Immigra-
tion and Naturalization Service, Honolulu, Hawaii,
Appellee. Transcript of Record. Appeal from the
United States District Court for the District of
Hawaii.

Filed March 24th, 1956.

Docketed April 6th, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.



No. 15090

United States
Court of Appeals
for the Ninth Circuit

SAMUEL J. CHASE and JEANNETTE S.
CHASE,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

**Petition to Review a Decision of the Tax Court
of the United States**

FILE

JUN -8 1956



No. 15090

United States
Court of Appeals
for the Ninth Circuit

SAMUEL J. CHASE and JEANNETTE S.
CHASE,

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Transcript of Record

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of the United States



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

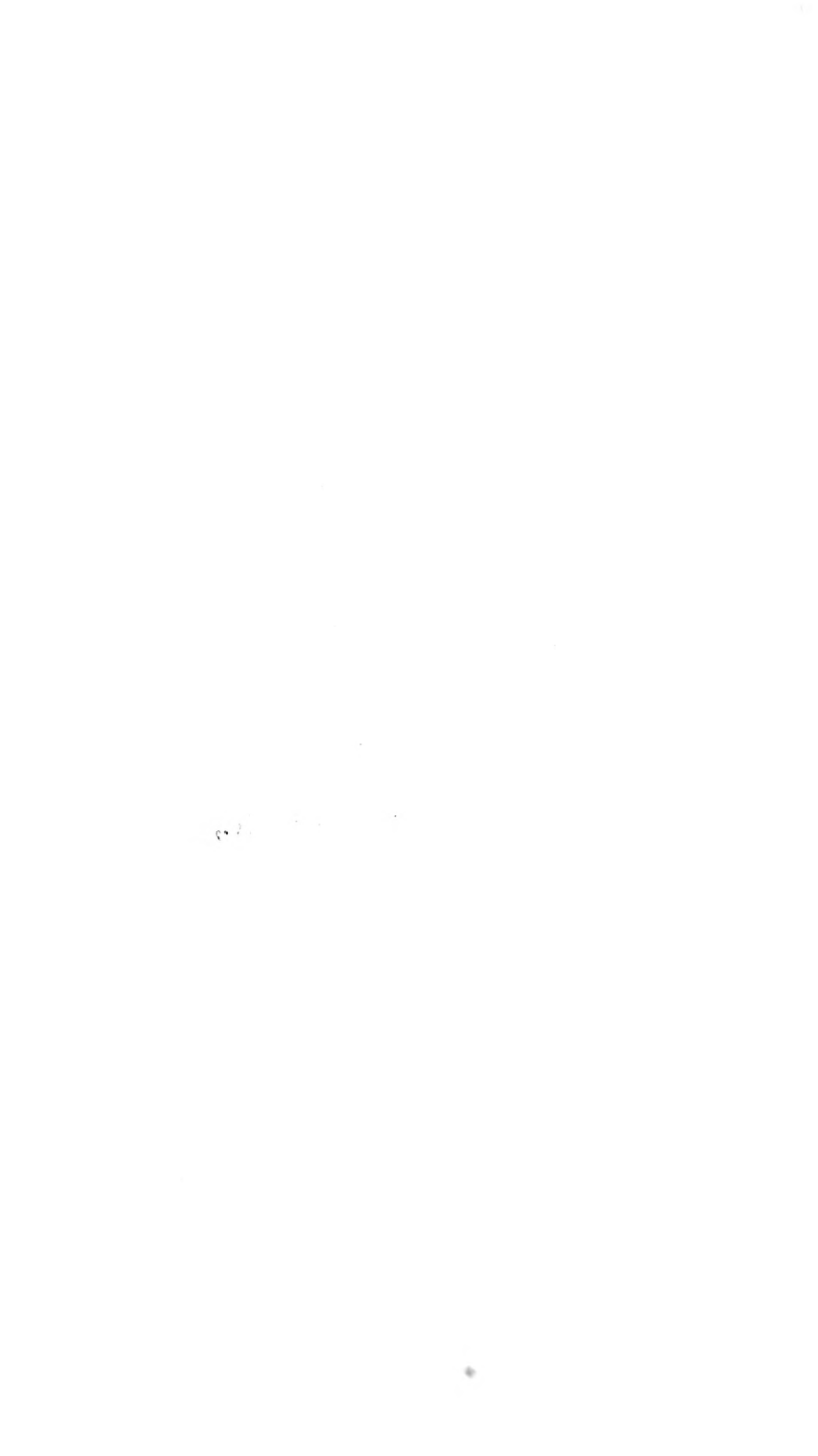
For Petitioner:

LESLIE W. IRVING, ESQ.,
1212 Broadway,
Oakland 12, Calif.

For Respondent:

CHARLES K. RICE,
Asst. Attorney General,

LEE A. JACKSON,
Atty., Dept. of Justice, Tax Div.,
Washington, D.C.



The Tax Court of the United States

Docket No. 56183

SAMUEL J. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1955

- Feb. 1—Petition received and filed. Taxpayer notified. Fee paid.
- Feb. 2—Copy of petition served on General Counsel.
- Feb. 1—Entry of appearance of Leslie W. Irving as counsel filed.
- Feb. 1—Request for Circuit hearing in San Francisco, California, filed by taxpayer. 2/8/55. Granted.
- Mar. 28—Answer filed by General Counsel.
- Mar. 31—Copy of answer served on taxpayer, San Francisco, California.
- Aug. 16—Joint motion to consolidate with dockets 56169 and 56230 and for submission under Rule 30 filed.
- Aug. 16—Stipulation of facts filed.
- Aug. 24—Order, assigning proceeding to Judge Kern, Div. 16, for disposition. Time for filing briefs to be fixed by said Judge, entered.

1955

- Sept. 9—Order, allowing parties until 10/13/55 for filing briefs and until 10/28/55 for filing reply briefs, entered.
- Oct. 10—Brief filed by taxpayer. 10/14/55 Copy served.
- Oct. 13—Brief filed by respondent. Served 10/14/55.
- Oct. 25—Reply brief filed by taxpayer. Copy served 10/26/55.
- Dec. 6—Opinion filed, Kern, Judge. Decision will be entered for the respondent. Copy served 12/6/55.
- Dec. 9—Decision entered, Kern, Judge, Div. 16.

1956

- Jan. 3—Order, vacating decision and decision entered, Judge, Kern, Div. 16.
- Mar. 6—Bond in the amount of \$4,500.00 approved and filed.
- Mar. 6—Petition for review by United States Court of Appeals, Ninth Circuit, with assignments of error filed by petitioner.
- Mar. 6—Proof of service filed.
- Mar. 16—Designation of contents of record on review with acknowledgment of service thereon filed by petitioner.

In the Tax Court of the United States

Docket No. 56230

JEANNETTE S. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1955

Feb. 7—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 8—Copy of petition served on General Counsel.

Feb. 7—Entry of appearance of Leslie W. Irving as counsel filed.

Feb. 7—Request for Circuit hearing in San Francisco, California, filed by taxpayer. 2/9/55. Granted.

Mar. 28—Answer filed by General Counsel.

Mar. 31—Copy of answer served on taxpayer, San Francisco, California.

Aug. 16—Joint motion to consolidate with dockets 56169 and 56183 and for submission under Rule 30 filed.

Aug. 16—Stipulation of facts filed.

Aug. 24—Order, assigning proceeding to Judge Kern, Div. 16, for disposition. Time for filing briefs to be fixed by said Judge, entered.

1955

- Sept. 9—Order, allowing parties until 10/13/55 for filing briefs and until 10/28/55 for filing reply briefs, entered.
- Oct. 10—Brief filed by taxpayer. 10/14/55 Copy served.
- Oct. 13—Brief filed by respondent. Served 10/14/55.
- Oct. 25—Reply brief filed by taxpayer. Copy served 10/26/55.
- Dec. 6—Opinion filed, Kern, Judge. Decision will be entered for the respondent. Copy served 12/6/55.
- Dec. 9—Decision entered, Kern, Judge, Div. 16.

1956

- Jan. 3—Order, vacating decision and decision entered, Judge, Kern, Div. 16.
- Mar. 6—Bond in the amount of \$4,500.00 approved and filed.
- Mar. 6—Petition for review by United States Court of Appeals, Ninth Circuit, with assignments of error filed by petitioner.
- Mar. 6—Proof of service filed.
- Mar. 16—Designation of contents of record on review with acknowledgment of service thereon filed by petitioner.

[Title of Tax Court and Cause.]

Docket No. 56183

PETITION FOR REVIEW OF DEFICIENCY
DETERMINATION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Bureau Symbols Ap:SF:AA:SMS 90-D-BFP), dated November 29, 1954, and as a basis of his proceeding, alleges as follows:

1. The petitioner is an individual with residence at 5965 Keith Avenue, Oakland 18, California. Petitioner and Jeannette S. Chase are husband and wife, and filed separate returns for the period here involved with the Collector of Internal Revenue, San Francisco, California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on November 29, 1954.

3. The deficiency, as determined by the Commissioner, is in income taxes for the calendar year 1952 in the amount of \$2,155.78, the total amount of which is in controversy.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner has erroneously determined that Petitioner is not entitled to report the

sum of \$22,500.00 received in 1952 (being 100 per cent of the compensation received by said Petitioner for personal services covering a period of more than thirty-six calendar months from the beginning to the completion of said services) under Section 107 (a) of the Internal Revenue Code.

(b) The Commissioner has erroneously combined separate, distinct, independent and unrelated services performed by said Petitioner to support a contention that the compensation received for said services was less than 80 per cent of the total compensation received for personal services rendered.

(c) The Commissioner erred in determining a deficiency against Petitioner.

5. The facts upon which the Petitioner relies as a basis of this proceeding are as follows:

(a) At all times herein mentioned said Samuel J. Chase was an attorney-at-law, duly and regularly licensed to practice his profession.

(b) On December 5, 1946, George L. and Ida Leiter, his wife, executed a joint and mutual Will which provided among other things as follows:

“We hereby declare that although each of us has from time to time had and received property which was or is, or might be considered to be, separate property of one or the other of us and, likewise, we have taken and held and now hold property in joint tenancy with right of survivorship and bank accounts and other items of property owned by or payable to either of

us or to the survivor, nevertheless, our property has, during our marriage, become so intermixed that it would be impractical, if not impossible, to trace the strict ownership of, and title to the various items thereof so as to distinguish separate property from community property and we therefore agree and stipulate that all said property is and shall be deemed to be community property.”

(c) At the time of the execution of said joint and mutual Will George and Ida Leiter owned property of the approximate value of \$350,000 which included property held in joint tenancy or otherwise apparently payable to the survivor of the following approximate values:

Annuities	\$ 36,000.00
Bank accounts	\$ 96,500.00
Bonds—United States Series G	\$101,000.00
Real estate	\$ 60,000.00

(d) George L. Leiter died on January 23, 1947, and Ida Leiter, as survivor, claimed among other things, the properties held in joint tenancy or otherwise apparently payable to the survivor.

(e) Petitioner held innumerable conferences with Ida Leiter and Burdeitta L. Forrest for the purpose of effecting an amicable settlement of the controversy, but no such result was obtained.

(f) On February 10, 1947, Petitioner and Burdeitta L. Forrest, decedent's daughter, were ap-

pointed co-executors of the estate of George L. Leiter, deceased, and at that time Petitioner endeavored to have the Probate Court determine that the properties held in joint tenancy or otherwise apparently payable to the survivor were part of the estate. The Court refused to so rule.

(g) Thereafter, Petitioner filed a petition for instructions with the Probate Court for the purpose of resolving the controversy, the matter was heard on various dates, the Court refused to rule on the issue, and the matter was dropped from the calendar.

(g) Thereafter, Petitioner filed a petition for in-limited the estate proper to the separate property of George L. Leiter which was of a total value of \$70,300.00.

(i) By letter dated July 10, 1947, the Treasury Department advised Ida Leiter that the co-owner and P.O.D. Bonds could be paid to her or reissued in her name alone or in her name with a co-owner or a beneficiary, and by letter dated August 6, 1947, the Treasury Department transmitted forms to Ida Leiter for that purpose.

(j) On September 3, 1947, Petitioner filed an action in the Superior Court of the State of California, in and for the County of Alameda, Number 205572 and titled, "Complaint for Declaratory Judgment and Equitable Relief, for Possession of Real and Personal Property, and to Quiet Title Thereto and for Injunction and Accounting."

(k) In said case of Chase vs. Leiter Petitioner was represented by Chas. Wade Snook, Defendant, Ida Leiter, by Hagar, Crosby and Crosby, defendant, Burdeitta L. Forrest, by Ben F. Woolner, Burchard Styles and Elson Jones. The United States Attorney threatened to intervene in said action in support of the contention that the Treasury Regulations governed the disposition of Government Bonds.

(ll) On April 12, 1948, said action was set for trial for May 4, 1948.

(m) On April 15, 1948, Petitioner entered into an agreement with Leslie W. Irving, an attorney, which provided in substance that Leslie W. Irving would handle the case of Chase vs. Leiter for Petitioner, that compensation for his services would be contingent on success in the litigation and subsequent approval of a petition for compensation by the Probate Court, and that said Leslie W. Irving would assist in presenting said petition for compensation to the Probate Court.

(n) Pursuant to said contract, said Leslie W. Irving did the following among other things: Handled the case in the Trial Court, appealed from the decision of the Trial Court, and handled the appeal before the Appellate Court (the Appellate Court's decision was a 100 per cent victory for Petitioner's contentions), prepared and presented to the Probate Court a Petition for Compensation for Extraordinary Services Rendered pursuant to said contract.

(o) Petitioner performed a variety of services incident to the trial of the action, the appeal from the Trial Court's decision, the preparation and presentation of the appeal, the conservation of assets, the preparation and presentation of the petition for compensation for extraordinary services rendered.

(p) The services rendered by Petitioner were personal services, said services covered a period of more than thirty-six months, said services were separate and distinct from all other services rendered, and on or about May 28, 1952, Petitioner received the sum of \$22,500.00 being the amount ordered paid by the Probate Court for services rendered in connection with the case of Chase vs. Leiter, and being 100 per cent of the compensation therefor, and Petitioner reported said compensation under section 107(a) of the Internal Revenue Code—see Exhibit B attached hereto.

(q) During May of 1950, the Internal Revenue Department initiated an audit of the income tax returns of George and Ida Leiter, covering the period from 1941 to 1946. The Government claimed that George and Ida Leiter had not fully reported their income for said period and initially threatened a deficiency which would have wiped out the entire estate. Petitioner performed services in connection with the Government's income tax claim, the matter was settled by the payment of additional tax, penalty, and interest in the total amount of \$46,410.14, and a separate petition for compensation, based

largely on said services, was filed on June 29, 1953, and on November 12, 1953, the Court awarded Petitioner the sum of \$20,000.00 for services rendered primarily in connection with said income tax matter. Pursuant to said Court's Order, Petitioner received the sum of \$5,000.00 in 1953, and the sum of \$15,000.00 in 1954.

(r) The services rendered by Petitioner in connection with the case of Chase vs. Leiter were separate, distinct, severable, and unrelated to services rendered in connection with said income tax matter, and the bases for allowing compensation in the two situations were entirely different.

Wherefore, Petitioner prays that this Court may hear the proceeding and determine that Petitioner is entitled to report the sum of \$22,500.00 received in 1952, under Section 107(a) of the Internal Revenue Code, that the Commissioner is in error in determining deficiency, and that there is no Deficiency due.

/s/ SAMUEL J. CHASE.

Duly verified.

Exhibit A

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
Appellate Division—San Francisco Region
Room 1010, 870 Market Street
San Francisco 2, California

November 29, 1954.

In Replying Refer to
AP:SF:AA:SMS
90-D-BFP

Mr. Samuel J. Chase,
5965 Keith Avenue,
Oakland 18, California.

Dear Mr. Chase:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1952, discloses a deficiency of \$2,155.78 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday,

Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Room 1010, 870 Market Street, San Francisco 2. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By WILLIAM H. LAWDER,
Associate Chief, Appellate
Division.

Enclosures :

Statement

Form 1276

Agreement Form

Audit Statement

Ap :SF :AA :SMS
90D-BFP

Samuel J. Chase,
5965 Keith Avenue,
Oakland 18, California.

Tax Liability for the Taxable Year Ended December 31, 1952.

Year	Income Tax	Deficiency
1952	\$2,155.78

In making this determination of your income tax liability, careful consideration has been given to your protest dated August 25, 1954; to the statements made at the conference held on November 3, 1954.

Adjustments to Income
Year: 1952

Net income as disclosed by return	\$16,946.01
Net income as adjusted	\$16,946.01

Explanation of Adjustments

On or about September 8, 1952, you received a fee as compensation for personal services rendered to the Estate of George L. Leiter to which you applied the provisions of Section 107(a) of the Internal Revenue Code.

Due to the fact that the fee received in 1952 does not constitute at least 80 per centum of the total compensation received by you for personal services rendered to the Estate of George L. Leiter said fee is included in gross income for the calendar year 1952 without the benefits provided in Section 107(a) of the Internal Revenue Code.

Computation of Income Tax

Net or adjusted gross income, from Schedule No. 1	\$16,946.01
Exemptions: 2 at \$600.00 each	1,200.00
	<hr/>
Income subject to tax	\$15,746.01
Income tax	\$ 5,681.39
Self-employment tax (from return or as corrected)	0
Total tax liability	\$ 5,681.39
	<hr/>
Income tax liability disclosed by original return Account Number 53AF701797 First California District	\$ 3,525.61
	<hr/>
Deficiency in income tax	\$ 2,155.78
	<hr/> <hr/>

EXHIBIT B

Samuel J. Chase and Jeannette S. Chase—Special Computation Tax Pursuant to Internal Revenue Code, Section 107—For Recovery of Assets on Behalf of the Estate of George L. Leiter, Deceased

George L. Leiter and Ida Leiter, his wife, appointed Samuel J. Chase as one of the Executors of their Will.

George L. Leiter died on January 23, 1947, and Samuel J. Chase, as one of the executors immediately commenced proceedings for appointment as executor and, in addition, to recover for the benefit of the estate the assets of the estate. First, efforts were made immediately upon appointment and in an informal manner. Efforts were then made incident to the ordinary proceedings in probate. All of which being unsuccessful, on September 3rd, 1947, Samuel J. Chase commenced an action against his co-executor and other persons to recover various properties for said estate.

After partial recovery in the trial court and complete recovery upon appeal, a petition for a compensation was filed in the probate action, and, after extended testimony, on February 14, 1952, by order of the Superior Court, \$22,500.00 was ordered and directed to be paid to Samuel J. Chase as extraordinary compensation for services rendered to the estate for his part in recovering these assets.

On May 28, 1952, after said order directing payment had become final, Samuel J. Chase received the sum of \$22,500.00 for services rendered from January 23, 1947, to date of payment in connection with this matter. This was the entire amount paid for his extraordinary services. In addition, however, Samuel J. Chase had received the sum of \$3,062.00 in the year 1950, representing ordinary compensation as executor.

The following shows the proration of income to the tax return periods:

Year	Amount Allocable	Samuel J. Chase	Jeanette S. Chase
1947 (11 mos.)	\$ 3,867.19	\$ 1,933.59	\$ 1,933.59
1948 (year)	4,218.75	2,109.38	2,109.38
1949 (year)	4,218.75	2,109.38	2,109.38
1950 (year)	4,218.75	2,109.38	2,109.38
1951 (year)	4,218.75	2,109.38	2,109.38
1952 (5 mos.)	1,757.81	878.89	878.89
Totals	<u>\$22,500.00</u>	<u>\$11,250.00</u>	<u>\$11,250.00</u>

Samuel J. Chase

Year	Adjusted Income Reported	Tax Paid	Additional Income	Amended Adjusted Income	Total Tax	Additional Tax
1947	\$5,216.23	\$738.69	\$ 1,933.59	\$7,149.82	\$1,205.50	\$ 466.81
1948	3,703.80	362.00	2,109.38	5,813.18	745.10	383.10
1949	4,408.60	483.00	2,109.38	6,517.98	906.35	423.35
1950	4,289.43	478.00	2,109.38	6,398.81	913.74	435.74
1951	4,253.17	553.00	2,109.38	6,362.55	1,034.89	481.89
			<hr/>			
			\$10,371.11			\$2,190.89
1952—Additional income						
reported in 1952 return			878.89			
			<hr/>			
			\$11,250.00			

Jeannette S. Chase

Year	Adjusted Income Reported	Tax Paid	Additional Income	Amended Adjusted Income	Total Tax	Additional Tax
1947	\$5,299.03	\$871.85	\$ 1,933.59	\$7,232.62	\$1,358.30	\$ 486.45
1948	3,817.25	495.00	2,109.38	5,926.63	908.33	413.33
1949	4,540.18	501.00	2,109.38	6,649.56	936.46	435.46
1950	4,445.42	625.00	2,109.38	6,554.80	1,092.61	467.61
1951	4,384.07	708.00	2,109.38	6,493.45	1,232.23	524.23
			<hr/>			
			\$10,371.11			\$2,327.08
1952—Additional income						
reported in 1952 return			878.89			
			<hr/>			
			\$11,250.00			

Received and filed February 1, 1955, T.C.U.S.

Served February 2, 1955.

[Title of Tax Court and Cause.]

Docket No. 56183

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above-named, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1 to 3, inclusive. Admits the allegations contained in paragraphs 1 to 3, inclusive, of the petition.

4(a) to (c), inclusive. Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (a) to (c), inclusive, of paragraph 4 of the petition.

5(a) to (l), inclusive. Admits the allegations contained in subparagraphs (a) to (l), inclusive, of paragraph 5 of the petition.

(m) to (r), inclusive. For lack of information or knowledge sufficient to form a belief, denies the allegations contained in subparagraphs (m) to (r), inclusive, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ R. P. HERTZOG,
Acting Chief Counsel,
Internal Revenue Service.

Filed March 28, 1955, T.C.U.S.

The Tax Court of the United States

Docket No. 56169

LESLIE W. IRVING,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 56813

SAMUEL J. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 56230

JEANNETTE S. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JOINT MOTION FOR CONSOLIDATION AND
SUBMISSION UNDER RULE 30 OF THE
RULES OF PRACTICE

Comes now the parties to the above-entitled proceeding, by their respective counsel, and moves that

said proceedings be consolidated and be submitted to the Court on the pleadings and written stipulations of facts duly signed and submitted herewith under the provisions of Rule 30 of the Rules of Practice before the Tax Court of the United States; and that the Court fix a time for filing briefs within the provisions of Rule 30(a) of the Tax Court's Rules of Practice.

Wherefore, it is prayed that the Court will grant this motion.

/s/ LESLIE W. IRVING,
Counsel for Petitioners.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Filed August 16, 1955, T.C.U.S.

Granted August 24, 1955; J. Murdock, Judge.

Served August 29, 1955.

[Title of Tax Court and Causes.]

Docket Nos. 56169, 56183 and 56230

STIPULATION OF FACTS

It is hereby mutually stipulated and agreed by and between the parties hereto, through their respective counsel of record, that the following statements are true; that this proceeding may stand

submitted on the filing of this stipulation of facts; and that the Court fix a time for filing briefs within the provision of Rule 30(a) of the Tax Court's Rules of Practice.

1. Petitioners, Leslie W. and Ruth L. Irving, are individuals with residence at 2945 Russell Street, Berkeley, California. Said petitioners are husband and wife and filed a joint return for the period here involved with the Collector of Internal Revenue, San Francisco, California.

2. The Notice of Deficiency, a copy of which is attached to the Petition, in Docket No. 56169, was mailed to said petitioners on November 29, 1954.

3. The deficiency against petitioners, Leslie W. and Ruth L. Irving, as determined by the Commissioner, is in income taxes for the calendar year 1952 in the amount of \$19,468.06, the total amount of which is in controversy.

4. At all times herein mentioned said Leslie W. Irving was an attorney at law, duly and regularly licensed to practice his profession.

5. Petitioner Samuel J. Chase is an individual with residence at 5965 Keith Avenue, Oakland 18, California. Said petitioner and Jeannette S. Chase are husband and wife, and filed separate returns for the period here involved with the Collector of Internal Revenue, San Francisco, California.

6. The Notice of Deficiency, a copy of which is attached to the Petition in Docket No. 56183, was

mailed to petitioner, Samuel J. Chase, on November 29, 1954.

7. The deficiency of Samuel J. Chase as determined by the Commissioner is in income taxes for the calendar year 1952 in the amount of \$2,155.78, the total amount of which is in controversy.

8. At all times herein mentioned said Samuel J. Chase was an attorney at law, duly and regularly licensed to practice his profession.

9. Petitioner Jeannette S. Chase is an individual with residence at 5965 Keith Avenue, Oakland 18, California. Said petitioner and Samuel J. Chase are husband and wife, and filed separate returns for the period here involved with the Collector of Internal Revenue, San Francisco, California.

10. The Notice of Deficiency of Jeannette S. Chase, a copy of which is attached to the Petition in Docket No. 56230, was mailed to the petitioner, Jeannette S. Chase, on November 29, 1954.

11. The deficiency as determined by the Commissioner is in income taxes for the calendar year 1952 in the amount of \$2,014.40, the total amount of which is in controversy.

12. On December 5, 1946, George L. and Ida Leiter, his wife, executed a written contract, a copy of which is in the Clerk's Transcript on Appeal, pages 14 to 21, inclusive, which is attached hereto and marked Exhibit 1-A. Said contract provides, among other things, as follows:

“We hereby declare that although each of us has from time to time had and received property which was or is, or might be considered to be, separate property of one or the other of us and, likewise, we have taken and held and now hold property in joint tenancy with right of survivorship and bank accounts and other items of property owned by, or payable to either of us or to the survivor, nevertheless, our property has, during our marriage, become so intermixed that it would be impractical, if not impossible, to trace the strict ownership of, and title to the various items thereof so as to distinguish separate property from community property and we therefore agree and stipulate that all said property is, and shall be deemed to be community property.”

13. George L. Leiter died on January 23, 1947. At the time of the execution of said contract, George and Ida Leiter owned property of the approximate value of \$350,000.00 which included property held in joint tenancy or otherwise apparently payable to the survivor of the following approximate values:

Annuities	\$ 36,000.00
Bank Accounts	96,500.00
Bonds—U. S. Series G	101,000.00
Real Estate	60,000.00

14. Following the death of George L. Leiter, Ida Leiter, as survivor, claimed, among other things, the

properties held in joint tenancy or otherwise apparently payable to the survivor. Samuel J. Chase and Burdeitta L. Forrest, decedent's daughter, were named as executors of the Last Will and Testament of George L. Leiter, and they were appointed as such by the Superior Court of the State of California, in and for the County of Alameda and letters testamentary issued on February 11, 1947.

15. Charles Wade Snook was the sole attorney for said executors from the date of their appointment until the fourteenth day of May, 1948.

16. Samuel J. Chase contended that said contract converted all of the properties of George and Ida Leiter into community property, that the executors were entitled to possession, and that Ida Leiter was limited by the terms of said contract to the income therefrom.

17. Samuel J. Chase held innumerable conferences with Ida Leiter and Burdeitta L. Forrest for the purpose of effecting an amicable settlement of the controversy, but no such result was obtained.

18. Ida Leiter's contentions were supported by the following facts and circumstances:

a. On or about February 11, 1947, Samuel J. Chase urged the Probate Court to rule that all the properties of George and Ida Leiter, however held, were includible in the estate and to fix the executors' bond accordingly, but the Probate Court refused to so rule and fixed the executors' bond in the sum of \$46,000.00.

b. Thereafter, Samuel J. Chase filed a petition for instructions with the Probate Court for the purpose of resolving the controversy, the matter was heard on various dates, the Court refused to rule on the issue, and the matter was dropped from the calendar.

c. Thereafter, an inheritance tax appraiser valued the estate of George L. Leiter at an approximate value of \$70,300.00.

d. By letter dated July 10, 1947, the Treasury Department advised Ida Leiter that the co-owner and P.O.D. Bonds could be paid to her or reissued in her name alone or in her name with a co-owner or beneficiary, and by letter dated August 6, 1947, the Treasury Department transmitted forms to Ida Leiter for that purpose. The Treasury Department maintained that position in similar letters dated July 10, 1947; August 6, 1947; October 9, 1947; November 3, 1947; November 18, 1947; December 11, 1947, and February 17, 1948.

19. On September 3, 1947, petitioner Samuel J. Chase filed an action in the Superior Court of the State of California, in and for the County of Alameda, Number 205572, and titled, "Complaint for Declaratory Judgment and Equitable Relief for Possession of Real and Personal Property, and to Quiet Title Thereto and for Injunction and Accounting."

20. In said case of Chase v. Leiter, petitioner Samuel J. Chase was represented by Charles Wade

which is included in the Amended Petition of Samuel J. Chase, one of the executors, and attached hereto and marked Exhibit 2-B at pages 17 to 20, inclusive, and on February 16, 1949, petitioner Leslie W. Irving received the Trial Court's second Memorandum Opinion which is contained in the same Exhibit 2-B at pages 26 to 29, inclusive.

29. The judgment as rendered gave substantial support to Ida Leiter's contentions and to the Treasury Department's regulations, and petitioner Samuel J. Chase appealed—see Clerk's Transcript on Appeal, Exhibit 1-A.

30. The opening brief prepared by petitioner Leslie W. Irving in connection with said appeal is attached hereto and marked Exhibit 3-C, and the Reply Brief is marked Exhibit 4-D.

31. On January 24, 1950, petitioner Leslie W. Irving argued the matter before the Appellate Court, and, on March 13, 1950, the District Court of Appeals rendered its decision, a copy of which is attached to Exhibit 2-B at pages 1 to 24, inclusive.

32. The decision rendered by said District Court of Appeals fully recognized the contentions of petitioner Samuel J. Chase, and on or about May 15, 1950, the Appellate Court's Remittitur was filed with the County Clerk of Alameda County, copies of modified findings and amended judgment were served on defendants, and a copy left with the Trial Judge, and on May 22, 1950, the modified findings and amended judgment were signed and filed.

33. The records of the County Clerk of Alameda County show the following register entries in connection with the case of Chase v. Leiter:

Sept.	3, 1947	Complaint filed—summons issued.
Feb.	5, 1948	Summons filed.
Feb.	26, 1948	Answer and cross-complaint of Ida Leiter filed.
Feb.	27, 1948	Answer of Samuel J. Chase, etc. to cross-complaint filed.
March	8, 1948	Answer of Burdeitta L. Forrest as executrix, etc., to cross-complaint of Ida Leiter filed.
March	11, 1948	Memorandum to set cause for trial.
April	12, 1948	Action set for trial May 4, 1948, 9:30 a.m.
April	13, 1948	Notice of time of trial filed.
May	4, 1948	Notice of withdrawal of attorney filed.
May	4, 1948	Association of attorney filed.
May	4, 1948	Amendment to answer of Ida Leiter filed.
May	3, 1948	Affidavit for subpoena duces tecum filed—subpoena issued.
May	4, 1948	Action on trial continued to May 5, 1948, at 10:00 a.m. further trial.
May	5, 1948	Action on trial.
May	5, 1948	Defendant's motion for a nonsuit is denied.
May	5, 1948	Defendant's motion to file an amended cross-complaint to conform to proof is granted; and may be deemed as denied without the necessity of filing an answer thereto by plaintiff.
May	5, 1948	Action continued to June 25, 1948, 10:00 a.m. for further trial on briefs (30x5x15).
May	14, 1948	Notice of withdrawal of attorney filed.
May	15, 1948	Amendment to cross-complaint to conform to proofs filed.
June	25, 1948	Action on trial and submitted.
Sept.	10, 1948	Submission is set aside and continued to October 4, 1948, at 10:00 a.m. for further hearing.
Oct.	4, 1948	Oral argument presented and the matter is then submitted.
Oct.	11, 1948	Judgment granted in favor of plaintiff (plaintiff to present findings, etc.).

Oct.	11, 1948	Defendant's reply and memorandum filed.
Oct.	11, 1948	Defendant's reply and memorandum filed.
Oct.	11, 1948	Plaintiff's memorandum of points filed.
Oct.	11, 1948	Plaintiff's reply brief filed.
Oct.	11, 1948	Plaintiff's memorandum of points filed.
Feb.	11, 1949	Plaintiff's motion to set aside Order of Judgment on October 11, 1948, and to reopen its cases granted.
Feb.	11, 1949	Action on trial and submitted.
Feb.	15, 1949	Judgment granted to plaintiff (plaintiff to present findings).
April	27, 1949	Findings filed.
April	27, 1949	Judgment filed.
April	28, 1949	Notice of entry of judgment filed.
April	28, 1949	Memorandum of costs filed (\$73.95).
May	2, 1949	Notice of intention to move for new trial filed.
May	2, 1949	Notice of motion to tax costs May 9, 1949, at 2:00 p.m., Department 11.
May	3, 1949	Motion for new trial set for May 27, 1949, at 2:30 p.m.
May	9, 1949	Motion to tax costs granted in sum of \$42.45.
May	27, 1949	Motion for a new trial continued to June 3, 1949, 3:00 p.m.
June	3, 1949	Motion for a new trial denied.
June	10, 1949	Notice of appeal and for transcripts filed.
June	29, 1949	Notice of appeal by Ida Leiter filed.
June	29, 1949	Notice to Clerk to prepare transcript file.
June	29, 1949	Admission of personal arrangement for compensation for preparation of transcript filed.
July	2, 1949	Release of deposit for Court Reporter filed.
July	2, 1949	Clerk's and Reporter's Transcripts are completed and filed this day.
July	13, 1949	Clerk's and Reporter's Transcripts are certified as correct by the Clerk.
July	14, 1949	Clerk's and Reporter's Transcripts sent by Railway Express to Clerk of Supreme Court.
Sept.	6, 1949	Stipulation re Exhibits filed.
Jan.	5, 1950	Notice by plaintiff re Exhibits on appeal filed.
Jan.	9, 1950	Plaintiff's Exhibits 1, 3, 4, 8, 9, 11, 12, 18, 27, 28 to 34, and defendant's Exhibits A to E sent by Railway Express to Clerk District Court of Appeals.

May	22, 1950	Modified findings, etc. filed.
May	22, 1950	Amended Judgment filed.
May	22, 1950	Amended Judgment entered Volume 333, page 295.
May	22, 1950	Withdrawal of attorneys filed.
May	23, 1950	Notice of Judgment filed.
May	15, 1950	Remittitur filed (affirmed as amended).
May	15, 1950	Certified copy of opinion filed.
June	5, 1950	Stipulation to withdraw Exhibits filed.
June	5, 1950	Receipt for Exhibits filed.

34. A Probate Court Order is essential to payment of fees for extraordinary services.

35. On September 27, 1950, a petition for compensation for extraordinary services rendered by petitioner Samuel J. Chase and petitioner Leslie W. Irving in connection with the case of Chase v. Leiter was filed with the Superior Court. Hearings on said petition were had on November 1, 1950, December 6, 1950, December 13, 1950, January 10, 1951, and the matter was continued on 11 occasions from February 1, 1951, to July 25, 1951, at which time the Trial Court suggested defects in the petition and the filing of an amended petition.

36. On August 29, 1951, an amended petition for compensation for extraordinary services rendered by petitioner Samuel J. Chase, and petitioner Leslie W. Irving, in connection with the case of Chase v. Leiter, was filed with the Trial Court, Exhibit 2-B.

37. Pursuant to the order of the Probate Court, citation was issued and citations and a copy of the amended petition were served on all parties interested, and said matter came on for trial before the

Alameda County Superior Court on the following days: December 7, 1951; December 18, 1951; December 19, 1951; December 20, 1951, and January 31, 1952.

38. Evidence, oral and documentary, was submitted relating to the services rendered and the reasonable value thereof. In connection with said petition for compensation for extraordinary services rendered in the case of Chase v. Leiter, petitioner Leslie W. Irving submitted the briefs which are attached hereto and marked Exhibits 5-E and 6-F.

39. On February 14, 1952, the Court signed an order approving payment for services rendered in the case of Chase v. Leiter as follows: To the executor, Samuel J. Chase, \$22,500.00; to the attorney, Leslie W. Irving, \$45,000.00; a copy of the Court's Order is attached hereto and marked Exhibit 7-G, said order provides in part as follows:

“It Appearing to the Court and the Court Finds:

“That, as set forth in said Amended Petition, said Samuel J. Chase, said Executor, and said L. W. Irving, Attorney for said Executor, during the period from the commencement of the administration of said estate and up to and including the 22nd day of May, 1950, to wit, the date upon which, after the appeals from the Judgment of the Superior Court of the State of California, in and for the County of Alameda, in the action of Samuel J. Chase, Executor, etc., plaintiff, vs. Ida Leiter, et al., Defendants, Action No. 205572, Modified Findings and Amended

Judgment were signed, filed, entered and Notice of Entry thereof was given, respectively performed extraordinary services and were and are respectively entitled to extra compensation therefor out of said estate in the amounts hereinafter set forth.”

40. On or about April 14, 1952, the time for appealing from said Court’s Order fixing compensation for services rendered in the case of Chase v. Leiter expired.

41. On May 28, 1952, petitioner Samuel J. Chase received the sum of \$22,500.00 for services rendered in connection with the case of Chase v. Leiter pursuant to said Court’s Order.

42. On September 8, 1952, petitioner Leslie W. Irving received payment of the sum of \$45,000.00 for services rendered in the case of Chase v. Leiter pursuant to said Court’s Order.

43. On January 15, 1953, petitioners Leslie W. and Ruth L. Irving sent the Collector of Internal Revenue, San Francisco, a check for \$2,994.60 in payment of income tax for the calendar year 1952, and a copy of the 1952 return and letter of transmittal are attached hereto and marked Exhibit 8-H.

44. On May 28, 1952, Samuel J. Chase received the sum of \$22,500.00 for extraordinary services rendered in connection with the case of Chase v. Leiter pursuant to said Court Decree. Petitioner Samuel J. Chase and Jeannette S. Chase filed sepa-

rate returns. A copy of the return of Samuel J. Chase is attached hereto and marked Exhibit 9-I, and a copy of the return of Jeannette S. Chase is attached hereto and marked Exhibit 10-J.

45. On September 10, 1952, petitioners, Leslie W. and Ruth L. Irving, addressed a letter to the Collector of Internal Revenue, San Francisco, California, a copy of which is attached hereto and marked Exhibit 11-K, and enclosed a check in the amount of \$8,089.16, which is held in 9B Account (Suspense).

46. The services rendered by petitioner Leslie W. Irving in connection with the case of Chase v. Leiter and the petition for compensation for extraordinary services were personal services and said services embraced the following, among others: Preparation for the trial of the case of Chase v. Leiter, trial, preparation of briefs, various Court appearances, appeals from Trial Court's decision, argument in Appellate Court, briefs for Appellate Court, preparation of petition for compensation for extraordinary services rendered in connection with the case of Chase v. Leiter, various appearances before the Probate Court, preparation of briefs and memoranda.

47. The services rendered by petitioner Samuel J. Chase in connection with the case of Chase v. Leiter and the petition for compensation for extraordinary services were personal services and said services embraced the following, among other

things: Endeavors to resolve the Chase v. Leiter controversy through negotiations with Ida Leiter and Burdeitta L. Forrest, Probate Court procedures, correspondence with the Treasury Department; the filing of suit; conferences with attorneys and opposing counsel; selection of counsel; preparation for trial, appearance as a witness in the Chase v. Leiter trial; review of briefs, pleadings and Court decisions; appeal from Trial Court's decision; review of Appellate briefs and Appellate Court's decision; conferences with his attorney in connection with proceedings for extra compensation for extraordinary services rendered in connection with the case of Chase v. Leiter; review petition for compensation, data and briefs; conferences with witnesses; appearance as witness at the trial of petition for compensation for extraordinary services rendered in connection with the case of Chase v. Leiter.

48. During the month of May, 1950, the Internal Revenue Department initiated an audit of the income tax returns of George and Ida Leiter covering the period from 1941 to 1946. The Government claimed that George and Ida Leiter had not fully reported their income for said period.

49. On or about September 6, 1950, the Internal Revenue Agent advised petitioners Leslie W. Irving and Samuel J. Chase that he had secured certain financial statements which George L. Leiter had submitted to Central Bank. Said statements appear

at pages 18 to 20, inclusive of Exhibit 12-L. The Revenue Agent proposed additional taxes which with interest would have amounted to \$210,202.56. A copy of said proposal is set forth on page 22 of Exhibit 12-L.

50. The matter was settled by payment of tax in the amount of \$46,410.14 in accordance with the computation set forth on page 36 of Exhibit 12-L.

51. The sum of \$71,377.06 had been paid on account of Federal estate tax and interest, and during January of 1951, a claim for refund of Federal estate taxes was filed, a copy of which claim is attached hereto and marked Exhibit 13-M. On or about August 19, 1952, a refund in the amount of \$45,549.04 was received.

52. On June 29, 1953, a petition for allowances for extraordinary services performed by Samuel J. Chase in connection with State inheritance taxes for the period February 27, 1947, to June 22, 1950, inclusive, and for Leslie W. Irving for the period November 6, 1948, to August 12, 1952, inclusive; for services rendered in connection with Federal estate tax by Samuel J. Chase for the period August 27, 1947, to May 24, 1951, inclusive, and for additional services to be rendered; and for Leslie W. Irving for the period May 7, 1948, to August 19, 1952, inclusive, and for additional services to be rendered; for services rendered in connection with Federal income tax matters by Samuel J. Chase for the pe-

riod March 11, 1947, to January 3, 1952, inclusive; and for Leslie W. Irving for the period March 3, 1949, to June 5, 1951, inclusive; for services rendered in connection with State income tax by Leslie W. Irving for the period January 8, 1951, to February 1, 1951, inclusive; and for services rendered in connection with petitions for partial distributions by Samuel J. Chase for the period September 27, 1949, to June 25, 1952, inclusive; and for Leslie W. Irving for the period September 24, 1949, to April 23, 1952, and for services rendered and to be rendered by Samuel J. Chase and Leslie W. Irving in connection with the petition for extra compensation for extraordinary services rendered in the preceding matters, was filed with the Superior Court. A copy of said petition is attached hereto and marked Exhibit 12-L.

53. On August 3, 1953, said petition was transferred to Department One and set for hearing on August 27. On August 27 the matter was continued to November 6, at which time it was transferred to Department Seven. On November 6 the matter was tried, witnesses were sworn and examined and the matter continued until November 12, 1953.

54. On November 12, 1953, the Superior Court of the State of California, in and for the County of Alameda, ordered payment to Leslie W. Irving of the sum of \$40,000.00, and to Samuel J. Chase of the sum of \$20,000.00 for extraordinary services rendered in connection with the State inheritance

taxes, the Federal and State income taxes, Federal estate matters, and Petition for partial distributions, and a copy of said Court's Order is attached hereto and marked Exhibit 14-N.

55. A copy of the brief submitted in connection with said petition is attached hereto and marked Exhibit 15-O.

56. Following said Court's Order, the claim for refund of Federal estate taxes was reopened and on March 17, 1954, additional refund in the amount of \$22,263.98 was received.

57. On September 20, 1950, Samuel J. Chase and Burdeitta L. Forrest, executors, filed their third account with the Probate Court, and therein requested, among other things, reimbursement to Samuel J. Chase of expenses incurred in the case of Chase v. Leiter in the sum of \$865.22, and payment on account of statutory commissions of executors and statutory fees of attorney.

58. On October 10, 1950, the Probate Court issued its Order approving said third account and ordered reimbursement to Samuel J. Chase of the sum of \$865.22, and ordered payment on account of executors' statutory fees and commissions and statutory attorneys' fee as follows: To Samuel J. Chase, executor, the sum of \$2200.00, to Burdeitta L. Forrest, executrix, the sum of \$2200.00, to L. W. Irving, attorney, the sum of \$4400.00 as a portion of the statutory attorneys' fees and compensation. A copy of said Order is attached hereto and marked Exhibit 16-P.

59. Thereafter, said Leslie W. Irving paid a portion of said statutory fee, to wit, the sum of \$1500.00, to Charles Wade Snook.

/s/ LESLIE W. IRVING,
Counsel for Petitioners.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Filed August 16, 1955, T.C.U.S.

[Title of Tax Court and Cause.]

Docket Nos. 56169, 56183, 56230

Petitioner Samuel J. Chase was an executor of the estate of a California decedent, whose widow denied the claim of Chase as executor to the possession of certain property. Chase therefore brought suit against the widow also naming his co-executor as defendant because she would not join with him as plaintiff. Shortly before the trial of this case, Chase employed petitioner Leslie W. Irving as his attorney in this litigation on a contingent basis, but subject to the approval by the Probate Court of a petition for compensation. Some time after the trial of the case Irving became attorney for the estate. The litigation was successful and during the taxable year substantial fees were paid to Chase and Irving by the estate as compensation for extraordinary services rendered in this litigation which,

however, were less than 80 per centum of the total compensation received by Chase as executor and less than 80 per centum of all the compensation paid to Irving by the estate for legal services.

Held, section 107(a), I.R.C. 1939, not applicable to compensation received by Chase during taxable year, but is applicable to compensation received by Irving under rationale of *Marion B. Pierce*, 24 T.C. (April 29, 1955).

LESLIE W. IRVING, ESQ.,

For the Petitioners.

JOHN POTTS BARNES, ESQ.,

For the Respondent.

OPINION

Kern, Judge:

In Docket No. 56169, respondent determined a deficiency in the income tax of petitioners Leslie W. Irving and Ruth L. Irving for the year 1952 in the amount of \$19,468.06.

In Docket Nos. 56183 and 56230 respondent determined deficiencies in the income tax of petitioner Jeannette S. Chase and petitioner Samuel J. Chase for the year 1952 in the respective amounts of \$2,014.40 and \$2,155.78.

These cases were consolidated on joint motion and were submitted to the Court under Rule 30 upon a complete stipulation of facts.

The issue presented by the parties is whether petitioners are entitled to apply the provisions of section 107(a) of the Internal Revenue Code of 1939 to payments received by Leslie W. Irving and Samuel J. Chase in 1952 from the Estate of George L. Leiter, administered in the state court of California, for services rendered by them in connection with litigation instituted in a California Court by Chase, one of the executors of the estate, against the decedent's widow and his co-executor, in which Irving was engaged as counsel, when such payments were in amounts less than 80 per centum of the total amounts received from the estate respectively by Chase as executor's commissions and by Irving as attorney's fees. In his brief respondent says: "Respondent's denial of the application of Section 107(a) is based on the ground that the 80 per cent condition of the statute has not been met." As the case has been presented to us, that is the sole issue for the Court to decide.

We find the facts to be as stipulated and incorporate herein by this reference the stipulation of facts and exhibits attached thereto.

In order to give a factual background to our discussion of the issue presented in these proceedings, we shall set out a short resume of the facts stipulated. Necessarily, some of the facts contained in the long stipulation and the numerous exhibits are omitted from this resume but such omission is not to be taken as an indication that we have not given due

consideration to every fact established on the record.

Petitioners in Docket No. 56169 are husband and wife residing in California and filed their joint return for the period here involved with the Collector of Internal Revenue, San Francisco, California.

Petitioners in Docket Nos. 56183 and 56230 are husband and wife, residing in California, and filed separate returns for the period here involved with the same Collector of Internal Revenue.

Petitioner Leslie W. Irving (hereinafter referred to as "Irving") and petitioner Samuel J. Chase (hereinafter referred to as "Chase"), are lawyers.

One George L. Leiter died on January 23, 1947. A short time before his death he and his wife Ida signed a contract in the form of a joint will which provided that all of their property, regardless of how it was held or its nature when acquired, "shall be deemed to be community property." At that time the property had the approximate value of \$350,000 which included property held in joint tenancy or otherwise apparently payable to the survivor of the total approximate value of \$293,500, including joint bank accounts, annuities, United States Savings Bonds (Series G) and real estate.

By decedent's will Chase and decedent's daughter, Burdeitta L. Forrest, were named executors and testamentary trustees and were appointed as such executors by the proper California Court on February 11, 1947. One Charles W. Snook was the

sole attorney for the executors from the date of their appointment until May 14, 1948, the day before he took office as Judge of the California Superior Court to which he was appointed on April 12, 1948.

After decedent's death his wife Ida, as survivor, claimed the properties held in joint tenancy or otherwise apparently payable to the survivor while Chase contended that since the contract above referred to converted all of the property of decedent and his wife into community property, the executors were entitled to possession of all the property and Ida was entitled by the terms of the contract to only the income therefrom.

This dispute could not be settled amicably and Chase could not get a ruling on the matter from the Probate Court. Therefore, on September 3, 1947, Chase filed an action in the Superior Court of California titled "Complaint for Declaratory Judgment and Equitable Relief for Possession of Real and Personal Property, and to Quiet Title Thereto and for Injunction and Accounting" in which Ida Leiter was named defendant and Burdeitta L. Forrest was also named defendant because she had refused to join with Chase as a plaintiff. This action was filed on behalf of Chase by "Chas. Wade Snook, Attorney for Plaintiff." Ida was represented by counsel and Burdeitta was represented by other counsel.

On April 12, 1948, the day on which Snook was

appointed Judge, the case of Chase v. Leiter was set for trial on May 4, 1948.

“On April 15, 1948, petitioner Samuel J. Chase entered into an agreement with petitioner Leslie W. Irving which provided in substance that Leslie W. Irving would handle the case of Chase v. Leiter for said Samuel J. Chase, that compensation for services rendered by Leslie W. Irving would be contingent on success in this litigation and subsequent approval of a petition for compensation by the Probate Court and that said Leslie W. Irving would assist in presenting said petition for compensation to the Probate Court.”*

From April 15 to May 4, 1948, Irving prepared the case for trial and, among other services performed, he assembled the evidence and prepared a 75-page trial brief. On April 24, he was formally associated as attorney for the plaintiff in this case, which was tried on May 4, May 5, June 25 and October 4, 1948, and February 11, 1949.

On May 14, 1948, Irving was substituted for Snook as attorney for the executors of the estate of George L. Leiter.

The judgment of the trial Court in the case of Chase v. Leiter gave substantial support to Ida's contentions but an appeal was taken and the decision of the Court of Appeals fully recognized the contentions of Chase.

*Quoted from stipulation.

Thereafter, on September 27, 1950, a petition for compensation for extraordinary services rendered by Chase and Irving in connection with the case of *Chase v. Leiter* was filed in the appropriate Court. Hearings on this petition were held on November 1, December 6, and December 13, 1950, and January 10, 1951, and the matter was continued on eleven occasions from February 1, 1951, to July 25, 1951, at which time the Court suggested defects in the petition and the filing of an amended petition. Hearings were held on the amended petition, after proper notices, on December 7, December 18, December 19 and December 20, 1951, and January 31, 1952. On February 14, 1952, the Court signed an order finding that Chase and Irving in connection with the case of *Chase v. Leiter* "performed extraordinary services and were and are respectively entitled to extra compensation therefor out of said estate" in the amount of \$22,500 for Chase and \$45,000 for Irving, which amounts were paid to each of them later in the year, the payment to Chase being made on May 28 and the payment to Irving on September 8.

"The services rendered by petitioner Leslie W. Irving in connection with the case of *Chase v. Leiter* and the petition for compensation for extraordinary services were personal services and said services embraced the following, among others: Preparation for the trial of the case of *Chase v. Leiter*, trial, preparation of briefs, various Court appearances, appeals from Trial Court's decision, argument in

Appellate Court, briefs for Appellate Court, preparation of petition for compensation for extraordinary services rendered in connection with the case of Chase v. Leiter, various appearances before the Probate Court, preparation of briefs and memoranda.”*

“The services rendered by petitioner Samuel J. Chase in connection with the case of Chase v. Leiter and the petition for compensation for extraordinary services were personal services and said services embraced the following, among other things: Endeavors to resolve the Chase v. Leiter controversy through negotiations with Ida Leiter and Burdeitta L. Forrest, Probate Court procedures, correspondence with the Treasury Department; the filing of suit; conference with attorneys and opposing counsel; selection of counsel; preparation for trial, appearance as a witness in the Chase v. Leiter trial; review of briefs, pleadings and Court decisions; appeal from Trial Court’s decision; review of Appellate briefs and Appellate Court’s decision; conferences with his attorney in connection with proceedings for extra compensation for extraordinary services rendered in connection with the case of Chase v. Leiter; review petition for compensation, data and briefs; conferences with witnesses; appearance as witness at the trial of petition for compensation for extraordinary services rendered in connection with the case of Chase v. Leiter.”*

*Quoted from stipulation.

In May, 1950, an important tax matter came up in connection with the Federal income taxes of decedent for the years 1941 to 1946. The revenue agent proposed additional taxes which with interest would have amounted to over \$200,000. The matter was settled by the payment of tax in the amount of \$46,410.14.

Substantial services were also rendered to the estate by Chase and Irving in connection with the refund of Federal estate taxes, with state inheritance and income taxes and with petitions for partial distribution.

A petition for allowances for extraordinary services in connection with these tax matters and partial distributions was filed by Chase and Irving on June 29, 1953, and after due hearing the Court ordered payment to Chase of \$20,000 and to Irving of \$40,000 on account of such extraordinary services.

On October 10, 1950, the Probate Court "ordered payment on account of executors' statutory fees and commissions and statutory attorneys' fees as follows: to Samuel J. Chase, executor the sum of \$2,200.00, to Burdeitta L. Forrest, executrix, the sum of \$2,200.00, to L. W. Irving, attorney, the sum of \$4,400 as a portion of the statutory attorneys' fees and compensation." From the latter amount Irving paid \$1,500 to Snook.

The statutes of California provide that "the executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the

estate.” Although the situation faced by Chase in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor, and were properly paid for by the estate by an allowance to “be made as the Court may deem just and reasonable for * * * extraordinary services, such as * * * litigation in regard to the property of the estate * * *,” in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. In our opinion no part of these services can be treated separately with regard to the application of Section 107(a)¹, Alfred J. Loew, 17 T.C. 1349; even though compensated for as “extraordinary services,” Rosalyne A. Lesser, 17 T.C. 1479. See also, *Norcross v. United States*, 114 F. Supp. 51, *affd.* 222 F. 2d 209. Since the compensation received by Chase in the taxable year was less than 80 per centum of the total compensation received

¹Sec. 107 * * *

(a) Personal Services. If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual.

by him for his personal service as executor of the Leiter estate, he is not entitled to apply the provisions of this section to such compensation.

However, we reach a different conclusion with regard to the compensation received by Irving during the taxable year because of the peculiar circumstances incident to his employment by Chase to act as counsel for him in the case of *Chase v. Leiter*. At the time of his employment he was not the attorney for the estate, but was engaged by one of the executors to act as his attorney in that specific litigation, on a contingent basis dependent on the success of that litigation. It is true that another contingency was the approval of Irving's petition for compensation by the Probate Court, in the event that the litigation proved successful and it is also true that Irving later became attorney for the estate, but his right to a fee arose not because of his employment as attorney for the estate but because of his employment by Chase to represent him in that particular lawsuit at a time before he became attorney for the estate and with his fee being dependent on the success of that lawsuit. These circumstances, in our opinion, make his services in connection with this litigation divisible from his other services rendered as attorney for the estate under the rationale of *Estate of Marion B. Pierce*, 24 T.C. . . . (April 29, 1955). Therefore the fact that the compensation received by him for his services in connection with the case of *Chase v. Leiter* was less than 80 per centum of the total payments made to him by the

estate of Leiter does not preclude the application of Section 107(a) to the compensation received by him in the taxable year.

Decision will be entered for respondent in Docket Nos. 56183 and 56230.

Decision will be entered for petitioners in Docket No. 56169.

Filed December 6, 1955.

Served December 6, 1955.

The Tax Court of the United States,
Washington
Docket No. 56183

SAMUEL J. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed December 6, 1955, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,014.40 for the year 1952.

/s/ JOHN W. KERN,
Judge.

Entered December 9, 1955.

Served December 9, 1955.

The Tax Court of the United States
Washington

Docket No. 56230

JEANETTE S. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Opinion, filed December 6, 1955, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,155.78 for the year 1952.

/s/ JOHN W. KERN,
Judge.

Entered December 9, 1955.

Served December 9, 1955.

The Tax Court of the United States
Washington

Docket No. 56183

SAMUEL J. CHASE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER VACATING DECISION
AND DECISION

For cause appearing of record, it is

Ordered: That the decision entered December 9, 1955, be and the same is hereby vacated and set aside, and it is further

Ordered and Decided: That pursuant to the determination of the Court, set forth in its Opinion filed December 6, 1955, there is a deficiency in income tax of \$2,155.78 for the year 1952.

/s/ JOHN W. KERN,
Judge.

Entered January 3, 1956.

Served January 4, 1956.

[Title of Tax Court and Cause.]

Docket No. 56230

ORDER VACATING DECISION
AND DECISION

For cause appearing of record, it is

Ordered: That the decision entered December 9, 1955, be and the same is hereby vacated and set aside, and it is further

Ordered and Decided: That pursuant to the determination of the Court, as set forth in its Opinion filed December 6, 1955, there is a deficiency in income tax of \$2,014.40 for the year 1952.

/s/ JOHN W. KERN,
Judge.

Entered January 3, 1956.

Served January 4, 1956.

In the United States Court of Appeals
for the Ninth Circuit

T. C. Docket Nos. 56183, 56230

SAMUEL J. CHASE, JEANNETTE S. CHASE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Taxpayer, Samuel J. Chase, and Jeannette S. Chase, the petitioners in this cause, by Leslie W.

Irving, counsel, hereby file their petition for a review by the United States Court of Appeals for the Ninth Circuit of that part of the opinion of the Tax Court of the United States filed December 6, 1955, holding that Section 107(a), I.R.C. 1939, not applicable to compensation received by Samuel J. Chase during the taxable year 1952, and for a review of the decisions by the Tax Court of the United States entered on January 3, 1956, determining deficiencies in petitioners' federal income taxes for the calendar year 1952 in the following respective amounts: Samuel J. Chase, \$2,155.78, Jeannette S. Chase, \$2,014.40.

I.

Petitioners, Samuel J. Chase and Jeannette S. Chase are husband and wife, residing at 5965 Keith Avenue, Oakland 18, California, and said petitioners filed separate returns for the period herein involved with the Collector of Internal Revenue, San Francisco, California.

II.

Nature of the Controversy

The controversy involves the proper determination of petitioners' liability for federal income taxes for the calendar year 1952.

Samuel J. Chase was appointed one of the executors of the estate of George L. Leiter, deceased, during February of 1947. The properties of George L. and Ida Leiter, his wife, had an approximate value of \$350,000.00, and included property held in joint

tenancy or otherwise apparently payable to the survivor, of the total approximate value of \$293,500.00.

Decedent's widow contended that she was entitled to said joint tenancy property and Samuel J. Chase contended, on the contrary, that the executors were entitled to it.

Samuel J. Chase's services in connection with said controversy covered a period of more than thirty-six calendar months, and said services embraced the following, among others: Endeavors to resolve the Chase v. Leiter controversy through negotiations with Ida Leiter and Burdeitta L. Forrest, Probate Court procedures, correspondence with the Treasury Department; the filing of suit; conference with attorneys and opposing counsel; selection of counsel; preparation for trial, appearance as a witness in the case of Chase v. Leiter; review of briefs, pleadings and Court decisions; appeal from Trial Court's decision; review of Appellate briefs and Appellate Court's decision; conferences with his attorney in connection with proceedings for extra compensation for extraordinary services rendered in connection with the case of Chase v. Leiter; review petition for compensation, data and briefs; conferences with witnesses; appearance as witness at the trial of petition for compensation for extraordinary services rendered in connection with the case of Chase v. Leiter.

Samuel J. Chase's contentions were fully sustained by the Appellate Court's opinion (see Chase v. Leiter 96 C. A. 2d 439).

On February 14, 1952, the Probate Court ordered payment of \$22,500.00 to Samuel J. Chase for extraordinary services rendered in connection with the case of Chase v. Leiter.

Petitioners Samuel J. Chase, Jeannette S. Chase filed separate returns for the calendar year 1952 and reported said \$22,500.00 under Section 107(a) of the I.R.C.

The Commissioner of Internal Revenue held that petitioners were not entitled to the benefits of Section 107(a) because of a separate and subsequent Probate Court Order, dated November 12, 1953. ordering payment to Samuel J. Chase of the sum of \$20,000.00 for other, separate and distinct extraordinary services rendered, and determined deficiencies for the year 1952 in the following amounts: Samuel J. Chase, \$2,155.78, Jeannette S. Chase, \$2,014.40.

III.

The said taxpayers, Samuel J. Chase and Jeannette S. Chase, being aggrieved by the findings of fact and conclusions of law, contained in said findings and opinion of the Court insofar as they pertained to said taxpayers, and by its decision with respect to said petitioners entered pursuant thereto, desire to obtain a review thereof insofar as it pertains to said taxpayers by the United States Court of Appeals for the Ninth Circuit (being the Circuit in which is located the office to which was made the return of the tax in respect of which the liability arises).

IV.

Assignments of Error

Petitioners assign as error the following acts and omissions of the Tax Court of the United States:

(1) The failure to allow said petitioners the benefits of Section 107(a) I.R.C. 1939 with respect to the separately ordered compensation for extraordinary services rendered in connection with the case of *Chase v. Leiter*.

(2) The findings of deficiencies for the year 1952 in lieu of a determination that there is no income tax due from the petitioners for said year.

/s/ LESLIE W. IRVING,
Counsel for Petitioners.

Duly verified.

Received and filed March 6, 1956, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To John Potts Barnes, Chief Counsel, Internal Revenue Service, Internal Revenue Building, Washington 25, D. C.

You are hereby notified that the petitioners on the 6th day of March, 1956, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a Petition for Review by United States Court of Appeals for the Ninth Circuit of the decision of

In the United States Court of Appeals
for the Ninth Circuit

No. 15090

SAMUEL J. CHASE, JEANNETTE S. CHASE,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD TO BE
PRINTED

Appellants in the above-entitled cause hereby adopt as their statement of points on which they intend to rely on this appeal the statement of points on appeal, as it now appears in the transcript of record herein.

Appellants hereby designate for printing the entire certified transcript of the record, save and except, Exhibits 1-A to 16-P, inclusive, which are referred to in the Stipulation of Facts.

/s/ LESLIE W. IRVING,
Attorney for Appellants.

Dated: April 6, 1956.

Affidavit of mail attached.

[Endorsed]: Filed April 9, 1956, U.S.C.A.

[Title of Court of Appeals and Cause.]

STIPULATION FOR REDUCTION
OF RECORD

It is hereby stipulated and agreed as follows:

1. The Petition for Review of Deficiency Determination filed by Jeannette S. Chase in Docket No. 56230 and the Commissioner's answers thereto are substantially identical with the Petition for Review of Deficiency Determination filed by Samuel J. Chase in Docket No. 56183 and the Commissioner's answer thereto, and said Petitions present the same question for decision except for immaterial differences in amounts of tax.

2. The Petition for Review of Deficiency Determination filed by Jeannette S. Chase in Docket No. 56230 and the Commissioner's answer thereto need not be printed as part of the record on appeal in the above-entitled matter, but her case may be considered on the pleadings of said Samuel J. Chase and the same judgment may be entered in both cases.

/s/ LESLIE W. IRVING,
Attorney for Appellants.

/s/ CHARLES K. RICE,
Attorneys for Appellee.

Dated: April 16, 1956.

[Endorsed]: Filed April 20, 1956.



No. 15,090

United States Court of Appeals
For the Ninth Circuit

SAMUEL J. CHASE and JEANNETTE S. CHASE,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANTS' OPENING BRIEF.

LESLIE W. IRVING,
1212 Broadway, Oakland 12, California,
Attorney for Appellants.

FILE

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PAUL P. O'BRIEN,

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No. 15,090

United States Court of Appeals For the Ninth Circuit

SAMUEL J. CHASE and JEANNETTE S. CHASE,	}
<i>Appellants,</i>	

VS.

COMMISSIONER OF INTERNAL REVENUE,	}
<i>Appellee.</i>	

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a decision of The Tax Court of the United States which is reported at 25 T. C. No. 50 and set forth herein. (R. 41.) Samuel J. Chase and Jeannette S. Chase, husband and wife, reside at 5965 Keith Avenue, Oakland 18, California. They filed separate returns for the calendar year 1952 with the Collector of Internal Revenue, San Francisco, California. The Commissioner of Internal Revenue determined deficiencies in the income taxes of Samuel J. Chase and Jeannette S. Chase for the calendar year 1952 in the respective amounts of \$2,155.78 and \$2,014.40, and mailed notices of deficiency on November 29, 1954. Each appellant petitioned The Tax Court

of the United States for a redetermination of the claimed deficiencies. The petitions of Samuel J. Chase and Jeannette S. Chase were filed on February 1, 1955, and February 7, 1955, respectively, pursuant to the provisions of Section 6213 (a) I. R. C. 1954. The petition of Samuel J. Chase is set forth in the record herein (R. 7), but the substantially identical petition of Jeannette S. Chase is not printed pursuant to stipulation.

The Tax Court's opinion was filed on December 6, 1955, and decisions were entered on January 3, 1956, determining deficiencies against Samuel J. Chase and Jeannette S. Chase in the respective amounts of \$2,155.78 and \$2,014.40. On March 6, 1956, under Sections 7482(a) and 7482(b) (1) I. R. C. 1954, appeal was taken to this Court to review the judgment of The Tax Court (R. 55). This appeal and transcript of record were filed in this Court on April 3, 1956 (R. 61).

STATEMENT OF THE CASE.

(a) Nature of the Case.

The case involves the income tax liability of appellants for the year 1952. The only issue for decision is whether appellants are entitled to have the sum of \$22,500.00 received by Samuel J. Chase for extraordinary services rendered, taxed under Section 107(a) of the 1939 Code.

Samuel J. Chase was one of the executors of the estate of George L. Leiter, deceased. He rendered

extraordinary services in connection with the case of *Chase v. Leiter*—litigation involving the construction of a will and the right to possess substantial assets. On February 14, 1952, the Alameda County Superior Court determined that the reasonable value of his “*Chase v. Leiter*” services was \$22,500.00 and Samuel J. Chase was paid that amount in 1952. That was 100% of the compensation received for said services. The services covered a period of more than 36 calendar months and appellants claimed the right to spread the income ratably over the service period.

On November 12, 1953, said Court determined that the reasonable value of extraordinary services rendered by Samuel J. Chase in connection with matters unrelated to “*Chase v. Leiter*” i.e. matters relating to state inheritance taxes, federal and state income taxes, federal estate matters, and petition for partial distribution was \$20,000.00. That fee is hereinafter referred to as the “income tax” fee. The Commissioner claims the two fees should be combined and that appellants are not entitled to the benefit of Section 107(a) because the *Chase v. Leiter* fee of \$22,500.00 is less than 80% of total fees which Samuel J. Chase received from said estate.

The issue then is—shall the 1952 “*Chase v. Leiter*” fee be ‘brought into a hotch-potch’ with the 1953 “income tax” fee or are there justifiable bases for determining the severability of the “*Chase v. Leiter*” services.

The Tax Court found justifiable bases for determining that the attorney’s

“ . . . services in connection with this litigation (were) divisible from his other services rendered as attorney for the estate . . .” (R. 51.)

but denied Chase relief because

“ . . . his services in this regard were undertaken pursuant to his duties as such executor . . .” (R. 50.)

(b) Facts.

The facts are stipulated (R. 22).

Samuel J. Chase, an attorney, one of the executors of the estate of George L. Leiter, deceased, rendered extraordinary services in connection with the case of “*Chase v. Leiter*”—litigation involving the construction of a will and the right to substantial assets.

On August 29, 1951, an amended petition for compensation for extraordinary services rendered by Samuel J. Chase and his attorney, in connection with the case of *Chase v. Leiter*, was filed with the Alameda County Superior Court. See Exhibit 2-B. Said matter came on for trial on December 7, 18, 19, and 20, of 1951, and January 31, 1952. Evidence oral and documentary was submitted relating to the *Chase v. Leiter* services rendered and the reasonable value thereof, and on February 14, 1952, the Court determined that the reasonable value of the extraordinary *Chase v. Leiter* services rendered by Samuel J. Chase was \$22,500.00 (R. 34).

The *Chase v. Leiter* services rendered by Samuel J. Chase were personal services, covered a period of more than 36 calendar months, were separate and dis-

inct from all other services rendered, and appellants reported said compensation under Section 107(a) of the 1939 Code (R. 17).

After the Appellate Court had rendered its opinion in the case of *Chase v. Leiter*, then and only then, the Internal Revenue Department initiated an audit of the income tax returns of George and Ida Leiter, covering the period from 1941 to 1946. The Government claimed that George and Ida Leiter had not fully reported their income for said period, and on or about September 6, 1950, the Internal Revenue Agent advised Samuel J. Chase and his attorney that he proposed additional taxes which, with interest, would have amounted to \$210,202.56. The matter was settled by payment of tax in the amount of \$46,410.14. Thereafter, claim for refund of federal estate taxes paid was filed, and on or about August 19, 1952, a refund in the amount of \$45,549.04 was received.

On June 29, 1953, a petition for allowance for extraordinary services performed by Samuel J. Chase primarily in connection with the income tax services rendered by him and his attorney, was filed with the Alameda County Superior Court. On November 6, 1953, the matter was tried, witnesses were sworn and examined, and on November 12, 1953, said Court determined that the reasonable value of the extraordinary "income tax" services rendered by Samuel J. Chase was \$20,000.00 (R. 39).

The Tax Court held that the attorney's "*Chase v. Leiter*" services were divisible:

“... his services in connection with this litigation (were) divisible from his other services rendered as attorney for the estate . . .” (R. 51),

but that the executor’s services were not:

“Although the situation faced by Chase in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor, and were properly paid for by the estate by an allowance to ‘be made as the court may deem just and reasonable for . . . extraordinary services, such as . . ., litigation in regard to the property of the estate . . .,’ in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. In our opinion, no part of these services can be treated separately with regard to the application of Section 107(a) . . .”. (R. 50.)

(c) **Issues Involved.**

The sole issue here is the severability of the “*Chase v. Leiter*” services from the “income tax” services.

STATUTE INVOLVED.

Internal Revenue Code (1939)

“Sec. 107. (a) Personal Services. If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a

partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt of accrual.”

SPECIFICATION OF ERRORS RELIED UPON.

The specification of errors relied upon is set forth in the petition for review as follows:

(1) The failure to allow said petitioners the benefits of Section 107(a) I. R. C. 1939, with respect to the separately ordered compensation for extraordinary services rendered in connection with the case of *Chase v. Leiter*.

(2) The finding of deficiencies for the year 1952 in lieu of a determination that there is no income tax due from the petitioners for said year.

SUMMARY OF ARGUMENT.

The lump sum compensation which Chase received in 1952 for more than five years' "*Chase v. Leiter*" service may be spread over the service period if the "*Chase v. Leiter*" services are separate and distinct from the "income tax" services. In the instant case, the Tax Court recognized that the "*Chase v. Leiter*" services were divisible as to Irving and there is abundant authority to support the same conclusion as to Chase.

ARGUMENT.

Section 107(a) was enacted to relieve hardship.

In *Terrell v. Commissioner*, 14 T.C. 572, the Court held that a corporation manager's patent litigation services were severable from his duties as manager, saying:

"Congress added section 107 to the Code by the Revenue Act of 1939, section 220. The Senate Committee on Finance, which was responsible for the new provision, said:

It has been considered a hardship to tax fully the compensation of writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking. Under existing law, such persons have their income for the whole period aggregated into the final year. This results in two inequities: First, only the deductions, expenses, and credits of the final year are chargeable against the compensation for the full period; second, under our graduation surtax, the taxpayer is subjected to a considerably greater burden because of the aggregation of his compensation.

The present case comes precisely within the intent of Congress as expressed in section 107(a) and in the above explanation of its purpose. Here the petitioner undertook a special task, separate and distinct from all others, and especially from his regular duties as president and general manager of the corporation. It required much of his spare time over a long period. The compensation was entirely separate and distinct from his regular salary for regular services as an officer of the corporation. The very hardship which Congress

had in mind will result if the relief intended by section 107 (a) is not afforded him. Cf. *John Belle Keeble, Jr.*, 2 T.C. 1249.

The record shows that the personal services were sufficiently distinct and separate from the petitioner's duties and services as an officer of the corporation to regard them separately for the purpose of section 107(a). . . ."

Circumstances which have supported divisibility of services elsewhere support divisibility of "*Chase v. Leiter*" services from "income tax" services.

Time was a factor considered by the Court in determining severability in the *Terrell* case, *supra*. In the instant case, Samuel J. Chase, devoted approximately 1100 hours to the "*Chase v. Leiter*" matter. See Exhibit 2-B, page 37.

Wherever litigation has been involved, the services incident thereto have been held to be separate services.

See

Heath v. Early, 77 F. Supp. 474;

Love v. U. W., 85 F. Supp. 62;

Estate of Marion B. Pierce, 24 T.C. No. 14;

Terrell v. Commissioner, 14 T.C. 572.

The "*Chase v. Leiter*" services involved extended and bitterly contested litigation.

Severability has been predicated, in part, at least, on the fact that the Court's awards were based on separate and completed services rendered in connection with different matters. In *Estate of Marion B. Pierce*, *supra*, the Court said,

“... the court based its awards of compensation to Pierce, and others, in 1945, and in 1951, upon separate and completed services which were rendered in connection with two different plans for reorganization. Therefore, in the case of Pierce, the awards to him in 1945 and 1946 for his services in connection with the 1944 plan should not ‘be brought into a hotchpot’ with the award of the court to him in 1951 for his services in connection with the 1949 plan, and the prescribed percentage in 107(a), as amended, computed accordingly ...”

In the instant case, the Court’s order of February 14, 1952, approving compensation for “*Chase v. Leiter*” services, see Exhibit 7-G, and the Court’s order of November 12, 1953, approving compensation for “income tax” services, see Exhibit 14-N, should not be brought into a “hotchpot”. Incidentally, the “income tax” petition for extraordinary compensation, see Exhibit 12-L, would not have justified the payment of any amount for “*Chase v. Leiter*” services and vice versa.

With respect to Irving, the Tax Court recognized that the “*Chase v. Leiter*” services were severable, but it denied Chase the benefit of Section 107 (a) because, (1) he is executor, (2) he did his duty, (3) he was paid for his extraordinary services from estate funds pursuant to Court order. But executors are not denied the benefit of the statute, nor is one who does his duty, and the fact that Chase was paid for his extraordinary “*Chase v. Leiter*” services out of estate funds pursuant to Court order after an extended hearing to determine the reasonable value of the services

which he had performed is a reason for extending rather than denying the benefits of the statute.

The Tax Court's opinion with respect to Chase mentions none of the several cases which would support a holding that the "*Chase v. Leiter*" services are severable, but cases involving admittedly nonseverable services are cited to justify denial of the benefits of the statute. The cases cited are:

Alfred J. Loew, 17 T.C. 1347;

Rosalynne A. Lesser, 17 T.C. 1479;

Norcross v. United States, 114 F. Supp. 51 (R. 50).

In the *Norcross* case there was nothing in the record to permit the segregation of any part of the estate services rendered by the attorneys.

In the *Lesser* case the Court said,

"... We can not find that petitioner undertook a special task which is separate and distinct from all others he performed as a co-executor. ..."

"We have carefully considered the evidence and in particular the 'Third and final account and report of co-executors: Petition for executor's extraordinary commissions and petition for distribution', and nowhere do we have what could logically be denominated as a separate and special service. ..."

In the *Estate of Marion B. Pierce*, the Court said the Loew services were not divisible and separate, the Court saying:

"This case is distinguishable on its facts from *Civiletti v. Commissioner*, 152 F. 2d 332; *George*

J. Hoffman, Jr., 11 T. C. 1057; Alfred J. Loew, 17 T. C. 1347, affirmed per curiam 201 F. 2d 368; Ralph E. Lum, 12 T. C. 375; and Julia J. Nast, 7 T. C. 432. This case also is distinguishable from *Smart v. Commissioner*, *supra*, on the facts . . .”

“In Alfred J. Loew, *supra*, it was found that Loew’s services were continuous; that they were not divisible and separable. We pointed out that ‘the period of service is not to be broken up by the simple expedient of filing a petition for fees’, . . .”

“ . . . He (Pierce) could not resort to the filing of a petition for allowance of compensation as a device to break up ‘services of a homogeneous nature and covering a continuous period’ into segments, or units, or to mark the end of services. . . .”

Nor could Chase.

CONCLUSION.

We respectfully submit that the present case comes precisely within the intent of Congress as expressed in Section 107 (a) and in the above explanation of its purpose. Here, Chase undertook a special task, separate and distinct from all others, and especially from his regular duties as executor. It required much of his time—at least, 1100 hours—over a period of approximately five years. The Court fixed compensation for the extraordinary services rendered, was separate and distinct from his statutory commission as executor, and from the Court-fixed compensation for extraordinary services rendered in the income tax mat-

ter. Of necessity, in this type of action the executor must expend services over a long period of time and can only be compensated to the extent determined by the Court and after the period has expired. There is no way whatever for him to program in advance his compensation equitably over the years. The very hardship which Congress had in mind will result if the relief intended by Section 107 (a) is not afforded Chase.

Dated, Oakland, California,
June 11, 1956.

Respectfully submitted,
LESLIE W. IRVING,
Attorney for Appellants.

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No. 15090

**In the United States Court of Appeals
for the Ninth Circuit**

SAMUEL J. CHASE AND JEANNETTE S. CHASE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

FILED

JUL 17 1956

PAUL P. O'BRIEN, CLERK

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15090

SAMUEL J. CHASE AND JEANNETTE S. CHASE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court is reported at 25 T.C. No. 50. (R. 41-52.)

JURISDICTION

This petition for review (R. 55-59) involves federal income taxes for the taxable year 1952. On November 29, 1954, the Commissioner of Internal Revenue mailed notices of deficiency to the taxpayer Samuel J. Chase in the total amount of \$2,155.78 (R. 14-15) and to the taxpayer Jeannette S. Chase in the total amount of \$2,014.40.¹ Within ninety days thereafter and on Feb-

¹ The petition for review filed by Jeannette S. Chase and the Commissioner's answers thereto are omitted from the record by stipulation (R. 63) since they are substantially identical to the petition for review filed by Samuel J. Chase and the Commissioner's answers thereto except for immaterial differences in amounts of tax.

ruary 1, 1955, the taxpayers filed petitions with the Tax Court for redeterminations of the deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 7-19.) The decisions of the Tax Court were entered January 3, 1956. (R. 52-55.) The case is brought to this Court by a petition for review filed March 6, 1956. (R. 55-59.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court was correct in holding that Section 107(a) of the Internal Revenue Code of 1939 did not apply to executor's commissions received in 1952 for extraordinary services rendered an estate in litigation to determine the assets of the estate where other commissions were received in 1950 for ordinary services rendered and in 1953 for extraordinary services in connection with a different litigation and the amount received in 1952 was less than 80 per cent of the total amounts received in 1950, 1952 and 1953.

STATUTES INVOLVED

Internal Revenue Code of 1939:

[as added by Sec. 220(a), Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 107 as amended by Sec. 139(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 119(b), Revenue Act of 1943, c. 63, 58 Stat. 21]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF THIRTY-SIX MONTHS OR MORE AND BACK PAY.

(a) *Personal Services*.—If at least 80 per centum of the total compensation for personal serv-

ices covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt or accrual.

* * * * *

(26 U.S.C. 1952 ed., Sec. 107.)

Deering's Probate Code of California:

Sec. 571. *Duties of executor, etc.: Surviving partner.* The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. * * *

Sec. 900. *Expenses and compensation of executor, etc.* The executor or administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided; but when the decedent, by his will, makes other provision for the compensation of the executor, that shall be a full compensation for his services, unless by written instrument, filed in the court, he renounces all claim for compensation provided for in the will.

Sec. 901. *Commissions.* The executor, when no compensation is provided by the will or he re-

nounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent. If there are two or more executors or administrators, the compensation shall be apportioned among them by the court according to the services actually rendered by each. * * *

Sec. 902. *Allowances for extraordinary services, etc.: Employment of tax counsel, tax auditors, etc.* Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real or personal property, contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns, or the adjustment or litigation or payment of any of said taxes, litigation in regard to the property of the estate, the carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform.

The executor or administrator may also employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action which such persons, respectively, may lawfully perform in the computation, reporting, or

making of tax returns, or in negotiations or litigation which may be necessary for the final determination and payment of taxes, and pay from the funds of the estate for such services. * * *

STATEMENT

The Tax Court found the facts to be as stipulated between the parties (R. 42-52) and these facts may be summarized as follows:

This case involves income taxes for the year 1952. The taxpayers, husband and wife, residing in California, filed separate returns for that year. (R. 44.) The issue presented is whether the taxpayers are entitled to apply the provisions of Section 107(a) of the Internal Revenue Code of 1939² to payments of \$22,500 received by the taxpayer husband,³ Samuel J. Chase, in 1952 for services rendered an estate of which he was co-executor.

The decedent, George L. Leiter, died in 1947. Shortly before his death he and his wife, Ida, signed a contract in the form of a joint will which provided that all of their property, regardless of how it was held or its nature when acquired, "shall be deemed to be community property." At that time the property had an approximate value of \$350,000 of which about \$293,500 worth was property held in joint tenancy or otherwise apparently payable to the survivor, including joint bank accounts, annuities, United States Savings Bonds (Series G) and real estate. By the decedent's will the taxpayer and the decedent's daughter, Burdeitta L.

² References to "Code" or Internal Revenue Code refer to Internal Revenue Code of 1939.

³ References hereafter to the "taxpayer" refer to the taxpayer husband, Samuel J. Chase.

Forrest, were named executors and testamentary trustees and were appointed as such executors by the proper California court on February 11, 1947. (R. 44.)

After the decedent's death, his wife, Ida, as survivor, claimed the properties held in joint tenancy or otherwise apparently payable to the survivor while the taxpayer contended that since the joint contract converted all of the property of decedent and his wife into community property, the executors were entitled to possession of all the property. (R. 45.)

Since the dispute could not be settled amicably and a ruling on the matter could not be obtained from the Probate Court, on September 3, 1947, the taxpayer, as executor, filed an action for a declaratory judgment and to quiet title. The taxpayer, as executor, was represented by counsel in this action. (R. 45.) The judgment of the trial court, in 1949, gave substantial support to Ida's contentions. However, in 1950, upon appeal, the position of the executor was fully recognized and upheld. (R. 46.)

Thereafter, a petition for compensation for extraordinary services rendered by the taxpayer in connection with the above litigation was filed and various hearings were held which resulted in the filing of an amended petition. After several hearings on the amended petition, the Court signed an order finding that the taxpayer performed extraordinary services and was entitled to extra compensation therefor out of the estate in the amount of \$22,500. This amount was paid on May 28, 1952. (R. 48.)

The services rendered by the taxpayer in connection with the litigation and the petition for compensation for extraordinary services were personal services and

said services embraced the following, among other things: endeavors to resolve the controversy through negotiations with Ida and Burdeitta L. Forrest, Probate Court procedures, correspondence with the Treasury Department; the filing of suit; conference with attorneys and opposing counsel; selection of counsel; preparation for trial, appearance as a witness in the trial; review of briefs, pleadings and court decisions; appeal from the trial court's decision; review of appellate briefs and appellate court's decisions; conferences with his attorney in connection with proceedings for extra compensation for extraordinary services rendered in connection with the case; review of petition for compensation, data and briefs; conferences with witnesses; appearance as witness at the trial of petition for compensation for extraordinary services rendered in the case. (R. 48.)

An important tax matter arose in 1950 in connection with federal income taxes of decedent and his wife Ida for the years 1941 to 1946. The revenue agent proposed additional taxes which with interest would have amounted to over \$200,000. The matter was settled by the payment of approximately \$46,000. Substantial services were also rendered the estate by the taxpayer in connection with the refund of federal estate taxes, with state inheritance and income taxes and with petitions of partial distribution. A petition for allowances for extraordinary services in connection with these tax matters and partial distributions was filed by the taxpayer, and after due hearing, the Court, on November 12, 1953, ordered payment to the taxpayer of \$20,000 on account of such extraordinary services. (R. 39, 49.)

On October 10, 1950, the Probate Court ordered pay-

ment to the taxpayer, on account of executor's statutory fees, the sum of \$2,200. (R. 49.)

The \$22,500 compensation received by the taxpayer in the taxable year 1952 was less than 80 per cent of the total compensation received by him for his personal services as executor of the estate. (R. 47, 50-51.)

Although the situation faced by the taxpayer in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor and were properly paid for by the estate by an allowance for extraordinary services in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. (R. 50.)

The Tax Court held that Section 107(a) did not apply in this case and entered decisions for the Commissioner (R. 41-55), from which the taxpayers have appealed (R. 55-59).

SUMMARY OF ARGUMENT

As compensation for performing his duties as a co-executor of the estate of George L. Leiter, the taxpayer herein was compensated in a total amount of \$44,700. This sum was received in three separate payments: \$2,200 in 1950, representing the statutory fee allowed executors; \$22,500 in 1952, representing compensation allowed the executor for the performance of extraordinary services in litigation with the widow of the decedent; and \$20,000 in 1953 representing extraordinary services in connection with various tax matters. The question in this case is whether the \$22,500 received in 1952 may be considered as compensation for a per-

sonal service separate and distinct from the other services rendered so as to meet the requirement of Section 107 (a) of the Code that at least 80 per cent of the total compensation for personal services be received in one taxable year. The Tax Court upheld the position of the Commissioner and determined that there was only one personal service performed herein as executor and that this service could not be divided up into the various functions imposed as duties upon the executor. The ordinary run-of-the-mill activities of the executorship, as well as the extra duties arising out of either prolonged litigation or of tax complications are all part of the duties imposed by law upon the executor of an estate. The California Probate Code, Section 571, expressly requires the executor to take into his possession all the estate of the decedent. The fact that in this particular instance the taxpayer experienced unusual difficulties in complying with the provisions of the Probate Code does not provide any logical reason for considering these services as separate from any other services performed as executor. Likewise, the fact that the state law provides two methods for the determination of commissions an executor is to receive, one based upon the amount of the estate and the other providing allowances for certain extraordinary services, in nowise changes the fact that all of the services performed were of one nature. The taxpayer did not receive compensation for any services rendered the estate in a capacity other than that of executor, and all of the services which he performed were required of him as executor. The logical result of the taxpayer's argument would be to consider each extraordinary service performed as a separate and distinct undertak-

ing from the ordinary service as executor, and it is submitted that such an artificial breaking up of homogeneous services is not warranted for purposes of receiving the spread income benefits of Section 107(a) of the Code. And indeed, the courts have been zealous in refusing to allow such artificial separations of single personal services. Accordingly, it is submitted that the decisions of the Tax Court were correct and should be affirmed.

ARGUMENT

Extraordinary Services Rendered an Estate by an Executor Are Not Separate and Distinct From Other Extraordinary Services and Ordinary Services Rendered the Same Estate for Purposes of Determining Whether the Requirements of Section 107 (a) of the Internal Revenue Code of 1939 Are Met

As compensation for performing his duties as a co-executor of the estate of George L. Leiter, the taxpayer herein was compensated in a total amount of \$44,700. This sum was received in three separate payments: \$2,200 in 1950, representing the statutory fee allowed executors (R. 49); \$22,500 in 1952, representing compensation allowed the executor for the performance of extraordinary services in litigation with the widow of the decedent in the case of *Chase v. Leiter* (R. 47); and \$20,000 in 1953 representing extraordinary services in connection with various tax matters (R. 49). The question for determination in this case is whether the \$22,500 received in 1952 may be considered as compensation for a personal service separate and distinct from the other services rendered so as to meet the requirement of Section 107 (a) of the Code, *supra*, that at least 80 per cent of the total compensation for personal services be received in one taxable year. So contends

the taxpayer. It is the position of the Commissioner, however, that this payment can be considered only in conjunction with those received in 1950 and 1953, in which instance Section 107 (a) would not apply. The Tax Court affirmed the deficiency determinations of the Commissioner and held that there was only one personal service herein, the services performed as an executor, and that this service could not be divided up into the various functions that are imposed as duties upon the executor. In this respect the court stated (R. 50):

Although the situation faced by Chase in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor, and were properly paid for by the estate by an allowance to "be made as the Court may deem just and reasonable for * * * extraordinary services, such as * * * litigation in regard to the property of the estate * * *" in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. In our opinion no part of these services can be treated separately with regard to the application of Section 107(a), * * * even though compensated for as "extraordinary services," * * *.

Thus the "personal services" rendered by this taxpayer to the estate consisted of *all* of the services which he was required to perform as executor of the estate. The ordinary run-of-the-mill activities of the executorship and the extra duties arising out of either prolonged liti-

gation or of tax complications are all part of the duties imposed by law upon the executor of an estate.

The California Probate Code, Section 571, *supra*, provides that:

The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. * * *

It can be seen that as part of his job as executor, the taxpayer was required by law to take into the estate all of the assets of the decedent. If the circumstances had been different and there had been no litigation concerning these assets, it is clear that the taxpayer would not be contending that the collection of assets constituted a service distinct from the other services performed as executor. And indeed, in logic there is no reason why such services should be severed from the other services of the executor merely because in this particular instance the taxpayer experienced unusual difficulties in bringing the assets into the estate.

Provision for the compensation of executors is made in Sections 901 and 902 of the California Probate Code, *supra*. Section 901 sets up a statutory fee based upon the amount of the estate. Section 902 makes provision for those instances where it is necessary for the executor to perform certain extraordinary services—

such as sales or mortgages of real or personal property, *contested or litigated claims against the estate, the preparation of estate, inheritance, income, sales or other tax returns, or the adjustment or litigation or payment of any of said taxes, litigation in regard to the property of the estate, the*

carrying on of the decedent's business pursuant to an order of the court, and such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform. (Italics supplied.)

However, the mere fact that the State of California provides two methods for the determination of the commissions an executor is to receive for his services in nowise changes the fact that all of the services performed are of one nature—all were performed pursuant to the taxpayer's duties as an executor. The taxpayer did not receive compensation for any services rendered the estate in a capacity other than that of executor, and all of the services which he performed were those required of him as an executor.

The position of the taxpayer appears to be that because the extraordinary services in connection with the *Chase v. Leiter* litigation were compensated for separately, and because the compensation order of the Probate Court referred specifically to this particular litigation, they may be completely severed from all other duties the taxpayer performed as executor for the purposes of Section 107(a). If the taxpayer's argument is accepted an extension of the situation at bar would mean that if an executor could show that he satisfied the 36-month requirement of Section 107(a) it would then be possible for him to consider separately each service for which extraordinary compensation is allowed, such as each and every sale or mortgage of real or personal property, each separate tax problem, every different claim against the estate, *ad infinitum*. Basically, what the taxpayer's argument boils down to is an assertion that each and every extraordinary serv-

ice must be considered separately from every other extraordinary service and from the ordinary duties of an executor. It is submitted that all of these services for which extraordinary compensation is allowed are merely segments of one service, the service performed by an executor for an estate, and they cannot be broken down in an artificial manner as desired by the taxpayer for purposes of receiving the spread income benefits of Section 107(a) of the Code.

The Commissioner's position, as affirmed by the Tax Court, is well supported by the courts. In the case of *Lesser v. Commissioner*, 17 T.C. 1479, the taxpayer was a California executor who received commissions for extraordinary services performed by acting as tax counsel for the estate as allowed by Section 902 of the Probate Code. The argument was made, as in the case at bar, that the services as tax counsel must be considered as separate from other services performed as executor. The Tax Court refused to accept this argument, stating (p. 1483):

We can not find that petitioner undertook a special task which is separate and distinct from all others he performed as a co-executor. The mere filing of a petition for additional compensation does not make his work a special task. *Alfred J. Loew*, 17 T. C. 1347. What is obvious to us is that petitioner as a co-executor not only performed the ordinary and routine duties required of an executor but also successfully accomplished the difficult and the more complicated tasks which a less capable executor might relegate to others. Regular commissions allowable under section 901 are taken into account by the courts of California when fixing

extraordinary commissions under section 902, which recognizes performance of only one service under a single appointment. *In re Pomin's Estate*, 92 P. 2d 479.

Another California executor, in *Kauffman v. Westover*, 111 F. Supp. 752 (S. D. Calif.), was denied the right to apply the provisions of Section 107(a) of the Code to one fee received for extraordinary services, when other sums were received in various other accountings. The court held that a period of services under Section 107(a) might not be carved out of the total period for performance of the services by the simple expedient of rendering an account covering an aliquot period. See also *Norcross v. United States*, 114 F. Supp. 51 (N.J.), affirmed *per curiam*, 222 F. 2d 209 (C.A. 3d); *Loew v. Commissioner*, 17 T.C. 1347, affirmed *per curiam* 201 F. 2d 368 (C.A. 2d).

The same reasoning which persuaded the courts in the above ~~two~~ cases surely applies in this case at hand. Had the executor desired to wait, compensation for all services might have been made at once. The fact that payments were made at intervals does not change the basic nature of the services in any way so as to allow the severing which the taxpayer requests. And it might be argued that there is more reason for separating services performed as tax counsel for an estate from the other duties of an executorship, the situation in the *Lesser* case, *supra*, than in separating the services with which we are here concerned. In the *Lesser* case the taxpayer executor could have hired someone else to act as tax counsel for the estate; in this case clearly the taxpayer executor could not have relegated his duties as executor to someone else.

The services performed by the taxpayer herein were unitary, continuous and homogeneous, and as such they may not be broken up for the purpose of the application of Section 107(a) of the Code. The courts have been zealous in refusing to allow artificial breakdowns of such homogeneous services. An attempt to apply the section to commissions received by a trustee in an intermediate accounting was denied, *Civiletti v. Commissioner*, 152 F. 2d 332 (C.A. 2d), certiorari denied, 327 U.S. 804; *Lum v. Commissioner*, 12 T. C. 375. Where commissions of two types were received, one computed on the corpus of a trust and to be paid out of principal and the other based on income collected, the taxpayer has not been allowed to separate the services on the ground that they were too related to be disentangled. *Smart v. Commissioner*, 152 F. 2d 333 (C.A. 2d), certiorari denied, 327 U.S. 804; *Warren v. Commissioner*, 20 T. C. 378.

The fact that the taxpayer, in the performance of his duties, has become involved in litigation in no wise affects the nature of the services rendered, despite the contention of the taxpayer to the contrary. (Br. 9.) In fact, it is contemplated that in the performance of his duties an executor might become embroiled in litigation and Section 902 of the California Probate Code makes express provision for compensation should such an event arise.

The cases of *Terrell v. Commissioner*, 14 T. C. 572, and *Estate of Pierce v. Commissioner*, 24 T. C. 95, strongly relied upon by the taxpayer, present factual situations much dissimilar to the instant case. Terrell's services to a corporation in connection with a patent controversy were completely separate from his

duties as an officer of the corporation. Pierce's duties as general counsel for the Missouri Pacific Railroad were separate from services he rendered the railroad as a court-appointed attorney for the railroad in a reorganization under Section 77 of the Bankruptcy Act. However, in the present case, all of the services performed were the result of one service under a single appointment. The taxpayer performed no services which were not required of him as an executor, and all payments that were received came from the estate as the result of this single employment. The mere fact that the services performed required more time and effort than the normal services performed as an executor is not reason enough for considering such services as separate and distinct and the Tax Court rightly refused to allow such a separation. Accordingly, the spread-income benefits of Section 107 (a) of the Code are not here applicable.

CONCLUSION

For the foregoing reasons, it is submitted that the decisions of the Tax Court were correct and should be affirmed.

Respectfully submitted,

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Washington 25, D. C.

JULY, 1956.



No. 15091

United States
Court of Appeals
for the Ninth Circuit

See Vol. - 29691

PACIFIC-ATLANTIC STEAMSHIP COM-
PANY, a corporation, Appellant,

VS.

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, de-
ceased, Appellee.

Transcript of Record

(In Two Volumes)

VOLUME I.

Pages 1 to 290, Inclusive

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

SEP 11 1956

PAUL P. O'BRIEN, CLERK

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PACIFIC-ATLANTIC STEAMSHIP COM-
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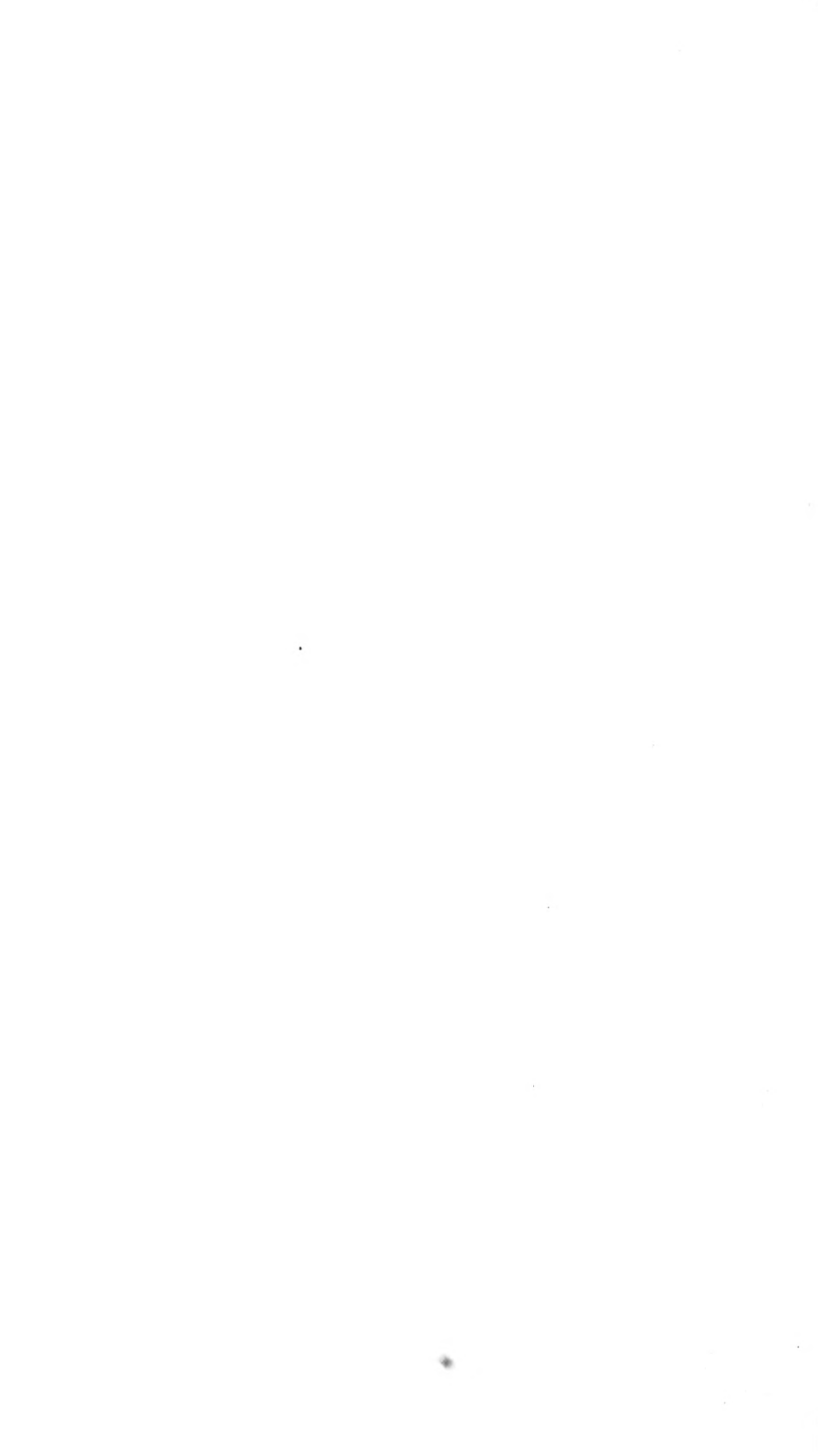
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In the District Court of the United States, Southern District of California, Central Division

No. 13,569-T

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, deceased,
Plaintiff,

vs.

PACIFIC-ATLANTIC STEAMSHIP CO., a corporation, etc., et al.,
Defendants.

FIRST AMENDED COMPLAINT FOR PERSONAL INJURIES AND WRONGFUL DEATH UNDER JONES ACT

Comes Now the Plaintiff, Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased, and complains of the Defendants and for first cause of action alleges:

I.

That this action is maintained under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as the "Jones Act," and all statutes amendatory and supplemental thereto.

II.

That on the 8th day of October, 1951, the Plaintiff, Emma Hutchison, by order of the Superior Court of the State of California in and for the County of Kings, was duly appointed Administra-

trix of the estate of Nathanael Patrick Hutchison, deceased, who died on or about the 30th day of April, 1951, and thereupon duly executed bond and took the oath as required by law, and Letters of Administration were thereafter duly issued to her as such Administratrix, and that said Letters of Administration have not been revoked; that deceased left him surviving, the Plaintiff, his wife, as dependent.

III.

That at all times herein mentioned the Defendant Pacific-Atlantic Steamship Co. was, and now is, a corporation organized under the laws of the State of Delaware, and engaged in and doing business within the State of California and the jurisdiction of this court.

IV.

That at all times hereinafter mentioned the Defendant Pacific-Atlantic Steamship Co. operated, controlled, and managed the steamship "Linfield Victory", and used it for transportation of freight for hire by water in interstate commerce and coastwise trade.

V.

That the true names and capacities, whether individual, corporate, associate or otherwise, of Defendants Doe I Company, Doe II Company, Doe III Company, Doe IV, Doe V, and Doe VI are unknown to Plaintiff, and therefore Plaintiff sues said Defendants by such fictitious names, and will ask leave to amend this Complaint to show their true

names and capacities and facts pertaining to the wrongful conduct of said Defendants when same have been ascertained.

VI.

That Plaintiff is informed and believes, and therefore alleges, that at all times hereinafter mentioned the Defendants Doe I Company, Doe II Company and Doe III Company, operated, controlled, and managed the steamship "Linfield Victory," and used it for transportation of freight for hire by water in interstate commerce and coast-wise trade.

VII.

That on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the Defendant Pacific-Atlantic Steamship Co. aboard said steamship as an able-bodied seaman with deck maintenance duties.

VIII.

That on or about said 24th day of April, 1951, the said steamship "Linfield Victory" was in the port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and performance of his duties, under the direction of an agent of the Defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said Defendant, with other employees of said Defendant; that said deceased while so engaged was directed by said agent of said Defendant to work in and about that

portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship, and located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft, causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering; that said injuries were directly caused by reason of the negligence of said Defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

IX.

That Defendant Pacific-Atlantic Steamship Co. and its employees were further negligent in failing to search for and discover said deceased Nathanael Patrick Hutchison at the bottom of said ventilating shaft in said injured condition until six days after said fall, to wit, on the 30th day of April, 1951, after said steamship had proceeded to and was in the port of Philadelphia, State of Pennsylvania.

X.

That as a result of the premises, the deceased Nathanael Patrick Hutchison sustained damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Second Cause of Action**I.**

Plaintiff refers to Paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of her first cause of action and by reference makes them a part hereof.

II.

That as a result of said injuries, said Nathanael Patrick Hutchison died at some time between the date of said fall, to wit, the 24th day of April, 1951, and the date on which said deceased was discovered at the bottom of said ventilating shaft, to wit, the 30th day of April, 1951, the exact date and time of the death being to the Plaintiff unknown; that said Nathanael Patrick Hutchison left surviving him as a dependent the Plaintiff herein, Emma Hutchison, who has, as a direct consequence of said death, suffered damages in the sum of Ninety Thousand Dollars (\$90,000.00).

Wherefore, Plaintiff demands judgment against Defendant Pacific-Atlantic Steamship Co. on the first cause of action in the sum of Twenty-five Thousand Dollars (\$25,000.00) and on the second cause of action in the sum of Ninety Thousand Dol-

lars (\$90,000.00), together with the costs and disbursements of this action.

Dated: September 30, 1952.

SIMPSON & WISE,
/s/ By RAYMOND C. SIMPSON,
Attorneys for Plaintiff

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 2, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT AND MOTION
TO STRIKE

* * * * *

13. Defendant Pacific-Atlantic Steamship Company, a corporation, moves for an order striking all of Paragraph IX of the first cause of action and Paragraph IX as incorporated by reference thereto in the second cause of action, upon the following grounds:

(a) The language contained in said paragraph constitutes nothing but conclusions and opinions of the pleader.

(b) There is no duty imposed upon the defendant by any statute to search for or discover the body of a deceased seaman or a living seaman in an injured condition.

(c) The language contained in Paragraph IX is immaterial.

(d) The language contained in said Paragraph IX is impertinent to any legal duty imposed upon the employer of a seaman pursuant to those portions of the Federal Employers' Liability Act, adopted by reference thereto in the Jones Act, modifying or extending the common law right or remedy available to railway employees.

(e) Said Paragraph IX is immaterial and impertinent to any of the factual bases of liability by reason of the death of a seaman pursuant to those portions of the Federal Employers' Liability Act which create or confer a right of action for the death of a railway employee.

Wherefore, defendant Pacific-Atlantic Steamship Company prays that said motions and each thereof be granted.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant Pacific-Atlantic Steamship
Company, a corp.

* * * * *

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT: JURY IM-
PANELMENT AND TRIAL

Date: Oct. 10, 1952, at Los Angeles, Calif.

Present: The Honorable Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Fred Sherry; Counsel for Libellant: R. C. Simpson; Counsel for Respondent: L. B. Gallagher.

Proceedings: For jury trial. At 9:15 a.m. court convenes in Chambers. Attorney for defendant moves to dismiss, for more definite statement, and to strike. Court denies said motions and allows defendant to 5 p.m., Nov. 13, 1952, to file answer to amended complaint.

At 10:15 a.m. court convenes in open court and all parties being present, Court orders trial proceed, and that a jury be impaneled.

The following jurors, duly impaneled, are sworn to try this cause.

1. Edward B. Patterson; 2. Clyde L. Smith; 3. Eugene T. Olsen; 4. Eugene P. Valentine; 5. Charlotte K. Brown; 6. John H. Daly; 7. George C. Malloy; 8. Joy L. Ziegler; 9. Agnes C. Reinwald; 10. Cornelia H. Leete; 11. Roy Frankson; 12. Alfred P. Brown. Alternate Juror: Alfred G. Smith.

It Is Ordered that cause is continued to Oct. 14, 1952, 11 a.m., for further jury trial.

EDMUND L. SMITH,
Clerk

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Defendant Pacific-Atlantic Steamship Company, a corporation, answers the first amended complaint as follows:

First Cause of Action

I.

Defendant denies the averments and each thereof in Paragraph I.

II.

Answering the averments in Paragraph II defendant specifically denies that Nathanael Patrick Hutchison died on or about the 30th day of April, 1951.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments and each thereof in Paragraph II.

* * * * *

IV.

Defendant denies the averments and each thereof in Paragraph IV.

* * * * *

VII.

Answering the averments in Paragraph VII defendant admits that from 8 a.m. until approximately 12:30 p.m. on the 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an

able bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty.

Except as hereinabove specifically admitted or alleged defendant denies the averments and each thereof in Paragraph VII.

VIII.

Answering the averments in Paragraph VIII defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the port of Baltimore, State of Maryland and that from 8 a.m. of said day until ten minutes to 12 a.m. on said date Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant with other employees of said defendant.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments or any thereof in said Paragraph VIII excepting the averments "that said injuries were directly caused by reason of the negligence of the defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a safe place to work" and with reference to said averments the defendant specifically denies that any injury was directly or at all caused by negligence on the part of said defendant or by reason of negligence on the part of said defendant either as averred or otherwise or at all and spe-

cifically denies that the law imposed upon said defendant any duty to supply Nathanael Patrick Hutchison with "safety appliances" or any safety appliance or to provide Nathanael Patrick Hutchison with a safe place to work.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that "deceased fell into said ventilator shaft".

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment "thereby precipitating him to the bottom of said ventilator shaft".

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment "causing him to sustain during his lifetime devastating and permanent personal injuries and conscious pain and suffering."

IX.

Defendant denies the averments and each thereof in Paragraph IX and denies that there was any legal duty imposed upon the defendant to search for or discover a deceased Nathanael Patrick Hutchison.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment or recital that Nathanael Patrick Hutchison sustained any injury by reason of a fall.

Second Cause of Action

I.

Defendant incorporates herein by reference thereto its answer to Paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the first cause of action and by such reference makes the same a part hereof.

With specific reference to Paragraph VIII of the first cause of action, incorporated by reference thereto in Paragraph I of the second cause of action, defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in said Paragraph VIII that "deceased fell into said open ventilator shaft"; that he was thereby precipitated to the bottom of said ventilating shaft or that any fall caused Nathanael Patrick Hutchison to sustain during his lifetime any injury or any pain or any suffering.

II.

Answering the averments in Paragraph II of said second cause of action defendant admits that Nathanael Patrick Hutchison is dead and that he was dead on the 30th day of April, 1951.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment in the form of a recital "the date of said fall."

Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments and each thereof in said Paragraph II of the second cause of action.

III.

Defendant specifically denies that plaintiff has been damaged in any sum whatsoever or at all.

* * * * *

As and for a Further, Separate and Special Defense, defendant avers that if Nathanael Patrick Hutchison fell into an open ventilator shaft or if he was thereby precipitated to the bottom of a ventilator shaft or if any such fall caused him to sustain personal injuries or if he suffered death by reason of any personal injury, then the said Nathanael Patrick Hutchison went into a part of the vessel where no duty called and where he had no duties to perform and the said Nathanael Patrick Hutchison so negligently and carelessly conducted himself that if he fell to the bottom of a ventilator shaft such fall was a proximate result of said negligence and carelessness on the part of said Nathanael Patrick Hutchison.

Wherefore defendant prays that plaintiff take nothing by said first amended complaint and that defendant have judgment for its costs incurred and to be incurred herein.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant Pacific-Atlantic Steamship
Company, a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 13, 1952.

[Title of District Court and Cause.]

VERDICT

First Cause of Action (Personal Injuries)

Upon the First Cause of Action, we the jury find in favor of Defendants and against Plaintiff and we find the damages sustained by Nathanael Patrick Hutchison to be the sum of \$ Nothing.

Second Cause of Action (The Suit for Damages for Death)

Upon the Second Cause of Action, we the jury do find in favor of Defendants and against Plaintiff.

* * * * *

The foregoing constitute the verdict of the jury.

Dated: This 29 day of October, 1952.

/s/ Illegible

Foreman of the Jury.

[Endorsed]: Filed October 29, 1952.

[Title of District Court and Cause.]

JUDGMENT ON VERDICT

This cause having been regularly tried by jury duly impanelled and sworn; R. C. Simpson, Esq., appearing as counsel for the plaintiff and Lasher B. Gallagher, Esq., appearing as counsel for the

defendant; and the trial having proceeded on October 16, 17, 21, 22, 23, 24, 28 and 29, 1952; and the jury having returned on October 29, 1952 its verdict as to the First Cause of Action (Personal Injuries) and the Second Cause of Action (Damages for Death) to the complaint as follows:

(1) As to the First Cause of Action the jury finds in favor of the Defendants and against the Plaintiff;

(2) As to the Second Cause of Action the jury finds in favor of the Defendants and against the Plaintiff;

Now, Therefore, in accordance with the aforesaid premises and said verdicts, and pursuant to law,

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendant and against the plaintiff.

Costs taxed at \$483.44.

Witness, the Honorable Ernest A. Tolin, United States District Judge, Southern District of California, this 29th day of October, 1952.

EDMUND L. SMITH,
Clerk

/s/ By WM. A. WHITE,
Deputy Clerk

[Endorsed]: Filed October 29, 1952. Judgment Docketed and Entered October 31, 1952.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER
RULE 36

To Pacific-Atlantic Steamship Co., Defendant:

Plaintiff Emma Hutchison requests defendant, within 15 days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:

(a) On April 24, 1951, there were no artificial lighting fixtures of any kind whatsoever installed inside the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(b) On April 24, 1951, you provided no artificial lighting appliances or devices, other than fixtures, of any kind whatsoever, in the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(c) On April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which,

on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(d) On April 24, 1951, you provided no temporary electrical installations of any kind whatsoever which could be used for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(e) On April 24, 1951, you provided no means of artificially illuminating the masthouse enclosing the ventilator shaft on the S.S. Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found.

(f) At all times during the month of April, 1951, pursuant to Bareboat Charter Agreement (Contract No. MA14) with the United States of America, you were operating, controlling, and managing the steamship, S.S. Linfield Victory.

(g) At all times between April 1, 1951, and October 13, 1952, you were doing business within the State of California and within the jurisdiction of the District Court of the United States for the Southern District of California.

SIMPSON, WISE & KILPATRICK,
/s/ By RAYMOND C. SIMPSON,
Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS
UNDER RULE 36

Subject to all pertinent objections to the admissibility thereof which may be interposed at the time of trial, defendant Pacific-Atlantic Steamship Co., a corporation, answers plaintiff's request for admissions as follows:

1.(a) The defendant can not truthfully admit or deny the foregoing statement for the reason that it is not in possession of any statement or information from any person who was inside of the masthouse enclosing said ventilator shaft with respect to whether there was or was not any portable artificial lighting fixture installed inside said masthouse enclosure on April 24, 1951. So far as defendant Pacific-Atlantic Steamship Co., a corporation, has been informed, the only persons who in all probability were in said masthouse enclosure on April 24, 1951, in addition to Nathanael Patrick Hutchison, were Ernest Kalnin, Bos'n, Richard L. Prouty, Andreas Amundsen, and Torale K. Eriksen, all unlicensed members of the deck department. On May 1, 1951, Lt. Comdr. W. R. Sayer, United States Coast Guard, conducted an investigation at Philadelphia, Pennsylvania, and took statements, under oath, from Ernest Kalnin, Andreas Amundsen, Torale K. Eriksen, and Richard L. Prouty. None of said men was asked any question with reference to the subject matter of request for admissions

1(a). None of said men is now in the employ of defendant Pacific-Atlantic Steamship Co., a corporation, and in order to answer this request for an admission it would be necessary for defendant to interview each of these men with reference to the subject matter of request 1(a). Defendant has no information or belief upon the subject sufficient to enable it to admit or deny purported statement 1(a), and placing its denial thereof upon said ground, denies said statement generally and specifically.

1.(b) Defendant can not truthfully admit or deny the purported statement contained in 1(b) for the reason that there were portable lighting appliances and devices, other than fixtures, which on April 24, 1951, could have been stored in the masthouse enclosing the ventilator shaft on the steamer "Linfield Victory" in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found, or such appliances or devices could have been stored, if not being stored in said portion of the masthouse, in other portions of the masthouse immediately adjacent to that part of the masthouse enclosing said ventilator shaft. The only persons who could answer this question categorically are those persons who were actually in said portion of the masthouse enclosing said ventilator shaft on April 24, 1951, and none of said persons has informed defendant with respect to said subject. It is also possible that said portable lighting appliances or devices could have been laying on the deck

immediately adjacent to the afterbulkhead of masthouse No. 2.

1.(c) On April 24, 1951, there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer "Linfield Victory" in which the body of Nathanael Patrick Hutchison was found on April 30, 1951. There was a permanent electrical installation consisting of electric current outlets permanently installed on the afterbulkhead of said masthouse and within 55 inches of the door leading into that portion of the masthouse enclosing said ventilator shaft, and the said permanent electrical installation could have been used on April 24, 1951, if necessary, for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the steamer "Linfield Victory" in which the body of Nathanael Hutchison was found on April 30, 1951.

1.(d) Defendant, by reference thereto, incorporates herein its answers to purported statements 1(a), 1(b), and 1(c) with the same effect as though said answers were, and each thereof was, repeated in detail herein.

1.(e) The steamer "Linfield Victory" was equipped with portable artificial lighting appliances and devices consisting of cords with reflector hoods and electric light bulbs on one end and suitable means at the other end for inserting or screwing such other end into an electric current outlet located on the afterbulkhead of masthouse No. 2 at a point approximately 55 inches from the door

leading into that portion of masthouse No. 2 in which an escape shaft and a ventilator shaft were located. Such portable artificial lighting appliances or devices, other than fixtures, were customarily stored in each of the masthouses of the vessel. Whether such appliances or devices were, on April 24, 1951, in that part of the masthouse No. 2 enclosing the ventilator shaft in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found is not known to affiant. So far as affiant has been able to ascertain no investigation has disclosed whether or not any such portable artificial lighting appliances or devices were actually within the portside of masthouse No. 2 on April 24, 1951.

1.(f) Defendant admits that during the month of April, 1951, pursuant to Bareboat Charter Agreement (Contract No. MA14) with the United States of America, it was operating and managing the steamer or steamship "Linfield Victory", in its intercoastal service. Defendant denies that it had unlimited control over the steamer "Linfield Victory" and in this respect alleges that Clause 11, Part 2, of said Bareboat Charter Agreement provided as follows: "Structural changes. The charterer shall make no structural changes in the vessel and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the written approval of the owner." The owner of said vessel was, at all times mentioned herein, the United States of America, Department of Commerce, Maritime Administration.

1.(g) Defendant admits that at all times between April 1, 1951, and October 13, 1952, it was doing business within the Southern District of California, Central Division.

/s/ LASHER B. GALLAGHER,
Attorney for the Defendant, Pacific-Atlantic
Steamship Co., a corporation

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed August 22, 1955.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED INSTRUCTIONS

Defendant's Proposed Instruction No. 1

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

B.A.J.I. No. 1.

Defendant's Proposed Instruction No. 2

If in these instructions, any rule, direction or

idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

B.A.J.I. No. 2.

Defendant's Proposed Instruction No. 3

At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

B.A.J.I. No. 3.

Defendant's Proposed Instruction No. 4

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

B.A.J.I. No. 4.

Defendant's Proposed Instruction No. 5

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

B.A.J.I. No. 5.

Defendant's Proposed Instruction No. 6

On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: It is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

B.A.J.I. No. 6-A.

Defendant's Proposed Instruction No. 7

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors,

and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

B.A.J.I. No. 7.

Defendant's Proposed Instruction No. 8

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind you that in your deliberations in the jury room

there can be no triumph excepting the ascertainment and declaration of the truth.

B.A.J.I. No. 8.

Defendant's Proposed Instruction No. 9

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if there is no preponderance of evidence on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

B.A.J.I. No. 21.

Defendant's Proposed Instruction No. 10

You shall not consider as evidence any statements of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you.

B.A.J.I. No. 23.

Defendant's Proposed Instruction No. 11

The plaintiff Emma Hutchison is the administratrix of the estate of Nathanael Patrick Hutchison, deceased. She is also the surviving widow of Nathanael Patrick Hutchison. She has filed a complaint pursuant to which she claims that she is entitled to recover damages from the defendant Pacific-Atlantic Steamship Company. This complaint contains two separate and distinct claims. In the first of these claims she contends that Nathanael Patrick Hutchison sustained conscious pain and suffering between the time he was injured and the time of his death. In the second claim set forth in the complaint she contends that she, as the surviving widow of Nathanael Patrick Hutchison, has suffered damage as a direct consequence of his death. The fact that she has filed the complaint does not carry with it any implication that she is actually entitled to recover any damage by reason of either of said claims.

The plaintiff, in her complaint, avers that Nathanael Patrick Hutchison suffered personal injuries in the course of his employment and that said injuries were directly caused by reason of negligence of the defendant in that, as she contends, it failed and neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about a ventilator shaft to provide a reasonably safe place in which to work and that as a proximate result thereof the said Nathanael Patrick Hutchison fell into the ventilator shaft thereby causing him to sustain during his lifetime personal injuries and conscious pain and suffering and that as a further proximate result thereof the said Nathanael Patrick Hutchison died.

Plaintiff avers in Paragraph VII of her complaint that on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard the SS "Linfield Victory" as an able-bodied seaman with deck maintenance duties. She also alleges in Paragraph VIII of her complaint that on or about the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of and performance of his duties, under the direction of an agent of the defendant Pacific-Atlantic Steamship Co., and in furtherance of the interest of said defendant, with other employees of said defendant; that said deceased while so engaged was directed by said agent

of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and located directly adjacent to an open ventilating shaft; and that in the course of said duties and employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft.

With reference to the averments in Paragraph VII of the complaint, the defendant in its answer admits that during a part of said 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an able-bodied seaman but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty. The defendant also, in answering the averments of Paragraph VIII of plaintiff's complaint, denies that at any time after 12:30 p.m. on the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant as an able-bodied seaman or in any other capacity. In other words, the defendant denies that the relationship of employer and employee existed between it and Nathanael Patrick Hutchison at any

time after approximately 12:30 p.m. on the 24th day of April, 1951.

In its answer to the averments in Paragraph VIII of the plaintiff's complaint, the defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland, and that from 8:00 a.m. of said day until 10 minutes of 12:00 a.m. on said date, Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant, with other employees of said defendant. Every other averment set forth in Paragraph VIII of plaintiff's complaint is denied in the answer of the defendant.

A statute enacted by the Congress of the **United States** provides that in case of the death of any seaman as a result of personal injury suffered in the course of his employment, the personal representative of such seaman may maintain an action for damages and that the employer of such deceased seaman shall be liable in damages to his personal representative for the benefit of the surviving widow for such death resulting in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances. Said statute enacted by the Congress also provides that any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law in the event such injury results in whole or in part by reason of any insufficiency, due to the employer's negligence, in its appliances and

that such right of action shall survive to his personal representative, for the benefit of the surviving widow of such seaman.

The material issues of fact with respect to the question of liability submitted to you for decision are the following:

1. Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?
2. Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving the averments set forth in plaintiff's complaint.

Defendant's Proposed Instruction No. 11-A

The plaintiff Emma Hutchison is the administratrix of the estate of Nathanael Patrick Hutchison, deceased. She is also the surviving widow of Nathanael Patrick Hutchison. She has filed a complaint pursuant to which she claims that she is entitled to recover damages from the defendant Pacific-Atlantic Steamship Company. In one of the claims averred in the complaint, she contends that Nathanael Patrick Hutchison sustained conscious pain

and suffering between the time he was injured and the time of his death. In another claim set forth in the complaint she contends that she, as the surviving widow of Nathanael Patrick Hutchison, has suffered damage as a direct consequence of his death. The fact that she has filed the complaint does not carry with it any implication that she is actually entitled to recover any damage by reason of either of said claims.

The plaintiff, in her complaint, avers in paragraph VIII that Nathanael Patrick Hutchison suffered personal injuries in the course of his employment and that said injuries were directly caused by reason of negligence of the defendant in that, as she contends, it failed and neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about a ventilator shaft to provide a reasonably safe place in which to work and that as a proximate result thereof the said Nathanael Patrick Hutchison fell into the ventilator shaft thereby causing him to sustain during his lifetime personal injuries and conscious pain and suffering and that as a further proximate result of said injuries the said Nathanael Patrick Hutchison died.

Plaintiff avers in Paragraph VII of her complaint that on or about the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Co. aboard the SS "Linfield Victory" as an able-bodied seaman with deck maintenance duties. She also alleges in Paragraph VIII of her

complaint that on or about the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course of his employment; that said deceased while so engaged was directed by said agent of said defendant to work in and about that portion of said steamship designated as the No. 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to No. 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and that said ladder was located directly adjacent to an open ventilating shaft; and that in the course of his employment, deceased fell into said open ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft.

With reference to the averments in Paragraph VII of the complaint, the defendant in its answer admits that during a part of said 24th day of April, 1951, Nathanael Patrick Hutchison was in the employment of the defendant Pacific-Atlantic Steamship Company aboard the SS "Linfield Victory" as an able-bodied seaman, but denies that during said period of time said Nathanael Patrick Hutchison was charged with or performing deck maintenance duties or any deck maintenance duty. The defendant also, in answering the averments of Paragraph VIII of plaintiff's complaint, denies

that at any time after 12:30 p.m. on the 24th day of April, 1951, the deceased Nathanael Patrick Hutchison was in the employment of the defendant. In other words, the defendant denies that the relationship of employer and employee existed between it and Nathanael Patrick Hutchison at any time after approximately 12:30 p.m. on the 24th day of April, 1951.

In its answer to the averments in Paragraph VIII of the plaintiff's complaint, the defendant admits that on the 24th day of April, 1951, the steamship "Linfield Victory" was in the Port of Baltimore, State of Maryland, and that from 8:00 a.m. of said day until 10 minutes of 12:00 a.m. on said date, Nathanael Patrick Hutchison was engaged in the course and performance of his duties and in furtherance of the interest of said defendant, with other employees of said defendant. Every other averment set forth in Paragraph VIII of plaintiff's complaint hereinabove referred to is denied in the answer of the defendant.

The issues of fact with respect to the foregoing averments of the complaint which have been denied in defendant's answer submitted to you for decision, are the following:

1. Did Nathanael Patrick Hutchison suffer personal injury in the course of his employment?

2. Did Nathanael Patrick Hutchison suffer such personal injury as a proximate result of a negligent failure or neglect on the part of the defendant to supply him with sufficient safety appliances in and

about the ventilator shaft to provide a reasonably safe place in which to work?

The burden of proof with respect to the said averments of the complaint which are denied in the answer of the defendant rests exclusively and continuously upon the plaintiff and does not at any time shift to the defendant. In other words, no burden rests upon the defendant to offer any evidence whatever for the purpose of disproving any of the averments set forth in plaintiff's complaint and which are denied in the defendant's answer.

Defendant's Proposed Instruction No. 12

Pursuant to certain so-called workmen's compensation statutes an employer becomes liable for the payment of compensation benefits to an employee injured in the course of his employment or to his widow in the event of his death by reason of injuries suffered in the course of his employment, regardless of whether the injury or death is or is not proximately caused or contributed to by negligence on the part of the employer. The law pursuant to which this case is governed is not a workmen's compensation statute. The mere fact that Nathanael Patrick Hutchison may have suffered personal injuries resulting in his death is not sufficient to entitle the plaintiff to recover any damages whatever even though Nathanael Patrick Hutchison may have been engaged in the course of his employment at the time he suffered such personal injury. There is no liability whatever on the part of the defendant in this case in the absence

of proof of a negligent failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place in which to work and proof by a preponderance of substantial evidence that such, if any, failure on the part of the defendant proximately caused or proximately contributed to the personal injuries suffered by Nathanael Patrick Hutchison.

Defendant's Proposed Instruction No. 13.

In your deliberations you are not permitted to determine what issues of fact are raised by the pleadings. Whether an issue of fact is or is not raised by the pleadings is a question of law and is within the sole province of the court.

Defendant's Proposed Instruction No. 14

The court will call to your attention certain averments set forth by the plaintiff in her complaint. In reading to you these allegations you will not understand or infer that the court is intimating that these averments of the complaint constitute anything more than claims asserted by the plaintiff. The averments of the complaint do not constitute evidence and may not be considered by you as evidence. Plaintiff alleges that on or about the 24th day of April, 1951, the "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said day the deceased Nathanael Patrick Hutchison was engaged in the course and performance of his duties, under the direction of an agent

of the defendant Pacific-Atlantic Steamship Company, and in furtherance of the interest of said defendant with other employees of said defendant; that said deceased while so engaged was directed by an agent of said defendant to work in and about that portion of said steamship designated as the number 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said number 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and that said ladder was located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said ventilator shaft, causing him to sustain personal injuries; and that said personal injuries caused Nathanael Patrick Hutchison to suffer during his lifetime conscious pain and suffering and that as a result of said personal injuries the said Nathanael Patrick Hutchison died; that said injuries were directly caused by reason of negligence on the part of defendant in that it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course or performance of his duties or under the direction of an agent of the defendant or in furtherance of the interest of said defendant at the time he suf-

ferred the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilator shaft in the course of any duty or employment; and also denies that there was any failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff.

Defendant's Proposed Instruction No. 14-A

The court will call to your attention certain averments set forth by the plaintiff in her complaint. In reading to you these allegations you will not understand or infer that the court is intimating that these averments of the complaint constitute anything more than claims asserted by the plaintiff. The averments of the complaint do not constitute evidence and may not be considered by you as evidence. Plaintiff alleges that on or about the 24th day of April, 1951, the "Linfield Victory" was in the Port of Baltimore, State of Maryland; that on said date the deceased Nathanael Patrick Hutchison was engaged in the course and performance of his duties; that said deceased while so engaged was directed by an agent of said defendant to work

in and about that portion of said steamship designated as the number 3 lower tween deck; that in the course of said employment in said portion of the ship, deceased had occasion to use and did use for the purpose of ascending and descending from and to said number 3 lower tween deck, a ladder within a vertical trunk extending upward from said lower deck to the main deck of said steamship; and that said ladder was located directly adjacent to an open ventilating shaft; that in the course of said duties and employment, deceased fell into said ventilator shaft, thereby precipitating him to the bottom of said ventilating shaft, causing him to sustain personal injuries; and that said personal injuries caused Nathanael Patrick Hutchison to suffer during his lifetime conscious pain and suffering and that as a result of said personal injuries the said Nathanael Patrick Hutchison died; that said injuries were directly caused by reason of negligence on the part of defendant in that as plaintiff contends, it failed and neglected to supply said deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work.

The defendant in its answer denies that Nathanael Patrick Hutchison was engaged in the course of his employment at the time he suffered the personal injury as a result of which he died. Defendant in its answer denies that the ventilating shaft was an open shaft and denies that the deceased fell into said ventilator shaft in the course of his employment; and also denies that there was any

failure on the part of the defendant to supply said deceased with sufficient safety appliances in and about said ventilator shaft or that, in this respect, there was any failure to provide a reasonably safe place in which to work.

Each averment of the complaint which is denied in the answer raises an issue of material fact. The sole and exclusive burden of proving each of these issues of fact rests and remains throughout the trial upon the plaintiff.

Defendant's Proposed Instruction No. 15

Your specific attention is directed to the proposition that the plaintiff does not aver in her complaint that any appliance in or about the ventilator shaft in masthouse No. 2 was defective. The only claim she makes in this respect is that the defendant did not supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In deciding whether the defendant is or is not liable in damages you are instructed that with respect to this particular element of plaintiff's claim you are restricted to determining whether there were or were not sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. If you find from all of the evidence that the defendant did supply a safety appliance about the ventilator shaft in masthead No. 2 and that said safety appliance was in itself sufficient to provide a reasonably safe place in which to work, it will be your duty to return a verdict

in favor of the defendant with reference to each of plaintiff's claims.

Defendant's Proposed Instruction No. 15-A

Your specific attention is directed to the proposition that the plaintiff does not aver in her complaint that any appliance in or about the ventilator shaft in masthouse No. 2 was defective. The only claim she makes in this respect is that the defendant did not supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In deciding whether the defendant is or is not liable in damages, you are instructed that with respect to this particular element of plaintiff's claim you are restricted to determining whether there were or were not sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. If you find from all of the evidence that the defendant did supply a safety appliance about the ventilator shaft in masthouse No. 2 and that said safety appliance was in itself sufficient to provide a reasonably safe place in which to work, it will be your duty to find defendant was not negligent in this respect.

Defendant's Proposed Instruction No. 16

There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2. The averment or claim of the plaintiff, denied by the defendant, is that the defendant

negligently failed and neglected to supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work. Therefore the claim of the plaintiff in this respect is that the pipe railings surrounding the opening in the masthouse deck at the top of the ventilator shaft were not in themselves a reasonably sufficient safety appliance in and about said ventilator shaft to provide a reasonably safe place to work. If you find from all of the evidence that the pipe railings surrounding opening at the top of the ventilator shaft was a safety appliance and that it, without anything more, was a reasonably adequate safety appliance and provided a seaman whose duties might require him to be in the masthouse in the performance of his duties with a condition of reasonable safety in the event such seaman was exercising ordinary care for his own safety and preservation, then you are instructed that no duty was imposed by law upon the defendant to provide any other, different or additional safety appliance in and about the said ventilator shaft.

Defendant's Proposed Instruction No. 16-A

There is no averment set forth in plaintiff's complaint that the defendant negligently or otherwise failed or neglected to supply the deceased with a safety appliance about the ventilator shaft in masthouse No. 2. The averment or claim of the plaintiff in this respect, denied by the defendant, is that the defendant negligently failed and neglected to

supply the deceased with sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work. Therefore the claim of the plaintiff in this respect is that the pipe railings surrounding the opening in the masthouse deck at the top of the ventilator shaft were not in themselves a reasonably sufficient safety appliance in and about said ventilator shaft to provide a reasonably safe place to work. If you find from all of the evidence that the pipe railings surrounding opening at the top of the ventilator shaft was a safety appliance and that it, without anything more, was a reasonably adequate safety appliance and provided a seaman whose duties might require him to be in the masthouse in the performance of this duties with a condition of reasonable safety in the event such seaman was exercising ordinary care for his own safety and preservation, then you are instructed that no duty was imposed by law upon the defendant to provide any other, different or additional safety appliance in and about the said ventilator shaft.

Defendant's Proposed Instruction No. 17

In so far as the second claim of plaintiff is concerned, the one in which she seeks damages by reason of the death of Nathanael Patrick Hutchison, you are instructed that that particular claim is predicated solely and exclusively upon a statute which provides, in so far as it may be applicable to the averments set forth in plaintiff's complaint, that the employer of a seaman shall be liable in

damages in the event his death is proximately caused, or proximately contributed to, by reason of any insufficiency, due to the ship operator's negligence, in its safety appliances in and about the ventilator shaft located in masthouse No. 2. Thus, in order to prevail on the second claim, the plaintiff must prove by a preponderance of substantial evidence that there was actually an insufficiency in the defendant's safety appliances in and about said ventilator shaft; that such, if any, insufficiency was due in whole or in part to negligence on the part of the defendant and that the death of Nathanael Patrick Hutchison was proximately caused or proximately contributed to by such, if any, negligence.

Defendant's Proposed Instruction No. 18

The law imposed upon the defendant the duty of exercising ordinary care to supply reasonably adequate safety appliances in and about the ventilator shaft located in masthouse No. 2 to provide a reasonably safe place to work, but this does not require the defendant to provide safety appliances which would have made the ventilator shaft reasonably safe for the use by or protection of any seaman excepting one who in his reasonably necessary use of the masthouse in and about the ventilator shaft is exercising ordinary care for his own safety and preservation. There is no duty imposed by law upon a ship operator to provide sufficient safety appliances which might be necessary for the purpose of preserving the bodily safety or life of a seaman who in his use thereof does anything which

an ordinarily prudent seaman would not do or fails to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances.

Defendant's Proposed Instruction No. 19

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. While the foregoing definition of negligence is a general definition, you are instructed that in applying this definition to the question of liability, if any, on the part of the defendant you are restricted to the evidence, if any, with respect to the specific claim of negligence which the plaintiff avers in her complaint.

Adapted from B.A.J.I. No. 101.

Defendant's Proposed Instruction No. 19-A

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. While the foregoing definition of negligence is a general definition, you are instructed that in applying this definition to the question of liability, if any, on the part of the defendant, you are restricted to the evidence, if any, with respect to the specific

averments of alleged negligent omissions which the plaintiff avers in her complaint.

Adapted from B.A.J.I. No. 101.

Defendant's Proposed Instruction No. 20

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

B.A.J.I. No. 101-B.

Defendant's Proposed Instruction No. 21

Ordinary care or reasonable care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

B.A.J.I. No. 102.

Defendant's Proposed Instruction No. 22

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

B.A.J.I. No. 103.

Defendant's Proposed Instruction No. 23

The proximate cause of an injury or death is a negligent act or omission which, in natural and

continuous sequence, unbroken by any efficient intervening cause, produces the injury or death, and without which the result would not have occurred. In this connection you are reminded of the proposition that the plaintiff does not aver in her complaint that the defendant committed any negligent act.

Adapted from B.A.J.I. No. 104.

Defendant's Proposed Instruction No. 24

You are instructed that in the absence of evidence, direct or indirect, to the contrary it is a presumption of law that the defendant in the pending case did not fail, negligently or otherwise, to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work. In the absence of evidence, direct or indirect, to the contrary your finding on this issue of fact must be in favor of the defendant. If you find in favor of the defendant on this particular issue of fact your verdict must be in favor of the defendant with respect to both of the claims asserted by her in her complaint.

Defendant's Proposed Instruction No. 25

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively established the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively

establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

You are not entitled to indulge in any presumption excepting those, if any, which the court in these instructions shall state is a deduction which the law expressly directs to be made from particular facts.

Adapted from B.A.J.I. No. 22.

Defendant's Proposed Instruction No. 26

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a wit-

ness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

B.A.J.I. No. 33.

Defendant's Proposed Instruction No. 27

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

B.A.J.I. No. 31.

Defendant's Proposed Instruction No. 28

One of the essential elements with reference to which the sole and exclusive burden of proof by a preponderance of evidence rests upon the plaintiff in this case is that at the precise time when Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died, the relationship of employer and employee existed between

said Nathanael Patrick Hutchison and the defendant and that he was engaged in the course of his employment as such employee. In this connection, you are instructed that until a seaman signs shipping articles or makes some oral agreement with the Master of a vessel pursuant to which the seaman obligates himself to assume for some specific period of time the status of an employee and thus subject to the call of duty as a seaman, the seaman has a right to quit his job at any time he may see fit to do so.

Defendant's Proposed Instruction No. 29

An employee is engaged in the course of his employment whenever he is doing any reasonable thing which his contract of employment expressly or impliedly authorizes him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment.

Adapted from B.A.J.I. No. 301-D.

Defendant's Proposed Instruction No. 30

You are instructed that regardless of the existence or non-existence of sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work there is no liability on the part of the defendant in this case unless the plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison actually suffered personal injury in the course of his employment. In this connection a sea-

man does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of substantial evidence that Nathanael Patrick Hutchison was actually in the course of his employment as a seaman at the very time he suffered personal injury, your verdict will be in favor of the defendant with respect to each of the claims set forth in plaintiff's complaint.

Defendant's Proposed Instruction No. 30-A

A seaman does not suffer a personal injury in the course of his employment unless at the time he suffered such personal injury he is actually engaged in the transaction of some business or the doing of some act which has been assigned to him by his employer or unless he is doing some reasonable thing which his contract of employment expressly or impliedly authorized him to do and which may reasonably be said to have been contemplated by that contract as necessarily or probably incidental to the employment. Unless plaintiff has proved by a preponderance of evidence that Nathanael Patrick Hutchison was actually in the

course of his employment as a seaman at the very time he suffered the personal injuries proximately caused at the time he struck the bottom of the ventilator shaft, you must find that the defendant is not liable for any damages by reason of conscious pain and suffering on the part of Nathanael Patrick Hutchison or by reason of a failure, if any, of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work.

Defendant's Proposed Instruction No. 31

Your specific attention is directed to the proposition that there is no averment in the plaintiff's complaint charging that the personal injuries and death of Nathanael Patrick Hutchison were or that either thereof was proximately caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to negligence on the part of defendant is her contention, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify the rendition of a verdict in favor of the plaintiff, she is required to prove by a preponderance of substantial evidence the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.

2. That such personal injury was suffered in the course of his employment.

3. That there was failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.

5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof.

Defendant's Proposed Instruction No. 31-A

You are instructed that there is no averment in the plaintiff's complaint charging that the personal injuries sustained at the time Nathanael Patrick Hutchison fell to the bottom of the ventilator shaft proximately caused, in whole or in part, by reason of any negligence on the part of any of the officers of the vessel or on the part of any of the members of the crew of said vessel. The sole claim averred by the plaintiff in her complaint with respect to the injuries sustained by her deceased husband at said time is her claim, which is denied by the defendant, that the defendant negligently failed and neglected to supply the deceased with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

In order to justify or support a finding in favor

of the plaintiff upon the issue with respect to said claim, she is required to prove by a preponderance of substantial evidence, the following elements and each thereof:

1. That Nathanael Patrick Hutchison suffered personal injury.

2. That such personal injury was suffered in the course of his employment.

3. That there was a failure on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work.

4. That such failure was proximately caused, in whole or in part, by negligence on the part of the defendant.

5. That as a proximate result thereof the said Nathanael Patrick Hutchison suffered personal injuries and died as a result thereof.

Defendant's Proposed Instruction No. 32

No omission may be considered negligent unless the danger of injury was reasonably foreseeable by the defendant, before the happening of the accident, in the exercise of that amount of care which would have been exercised by an ordinarily prudent employer under the same or similar circumstances. It is of the essence of actionable negligence that the party charged should, in the exercise of ordinary care and caution, have knowledge that the omission complained of was such an omission as might, within the realm of probability, cause some injury to a seaman exercising ordinary care for

his own safety. The circumstances necessary to be known before liability in consequence of an omission will be imposed must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof.

Defendant's Proposed Instruction No. 32-A

No omission may be considered negligent unless the danger of injury was reasonably foreseeable by the defendant by the exercise of that amount of foresight which would have been exercised by an ordinarily prudent employer under the same or similar circumstances. It is of the essence of actionable negligence that a preponderance of the evidence must show that the party charged should, in the exercise of ordinary care and caution, have anticipated that the omission complained of was such an omission as might cause some injury to a seaman exercising ordinary care for his own safety. The circumstances necessary to be known before liability, by reason of an omission, will be imposed, must be such as would lead a reasonably prudent man to anticipate a reasonably possible danger of injury as a proximate result thereof.

Defendant's Proposed Instruction No. 33

With respect to safety appliances about the ventilator shaft in masthouse number 2, the law does not require absolute perfection nor was the defendant required to furnish appliances having the highest known degree of safety. It is sufficient if a safety appliance be such as is reasonably fit for its

purpose and reasonably adequate for the purpose of preventing accidental injury to an employee who is exercising ordinary care for his own safety.

Defendant's Proposed Instruction No. 34

The law does not set up an unreasonable standard of conduct for an employer. Therefore, an employer is not an insurer of the safety of its employees. It is not the absolute duty of an employer to furnish a safe place to work. The only obligation is that the employer exercise reasonable care to provide a reasonably safe place in which to work.

Defendant's Proposed Instruction No. 35

In order to warrant or support a finding that an omission is a proximate cause of an injury, injury at least in some form must be shown by a preponderance of the evidence to have been foreseeable by the defendant, in the exercise of ordinary prudence, in the light of the attending circumstances.

Defendant's Proposed Instruction No. 35-A

One test to be applied in deciding whether there was or was not a negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work is the following: Prior to the time that Nathanael Patrick Hutchison in some manner got into the ventilator shaft and fell to the bottom thereof would an ordinarily prudent person operating the SS "Linfield Victory" have anticipated that the pipe railings

surrounding the opening at the top of the ventilator shaft were not reasonably sufficient to protect a seaman exercising ordinary care for his own safety and in the full possession of normal faculties from inadvertently falling into said ventilator shaft? If you answer this question in the negative, there was no negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work.

Defendant's Proposed Instruction No. 36

One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be substantial evidence justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew.

Defendant's Proposed Instruction No. 36-A

One of the required elements involved in the proof of negligence on the part of a defendant ship owner is that there must be evidence, direct or indirect, justifying a finding that under the existing circumstances the ship operator should reasonably have anticipated the danger of bodily injury or death to a member of the crew.

Defendant's Proposed Instruction No. 37

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such

an accident to be avoided. They simply denote an accident that occurred without having been proximately cause by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight or caution, still, no one may be held liable for injuries or death resulting from it.

Defendant's Proposed Instruction No. 38

You may not indulge in speculation, surmise or conjecture with respect to any of the matters or elements as to which the law places the burden of proof upon the plaintiff.

Defendant's Proposed Instruction No. 39

You are not permitted to speculate, conjecture or surmise with respect to when, how or in what manner Nathanael Patrick Hutchison sustained the injuries resulting in his death.

Defendant's Proposed Instruction No. 40

You are instructed that the pipe railings installed around the open sides of the ventilator shaft were supplied for the purpose of preventing any seaman, while exercising ordinary care for his own safety, from inadvertently falling into said ventilator shaft in the course of his employment, and that said pipe railings constituted a safety appliance for that purpose. If you find from the evidence the said pipe railings constituted all that a reasonably prudent employer would have furnished in the way of safety appliances in and about the

ventilator shaft in order to provide a reasonably safe place to work your verdict on both claims asserted by plaintiff must be in favor of the defendant.

Defendant's Proposed Instruction No. 40-A

You are instructed that the pipe railings installed around the open sides of the ventilator shaft were supplied for the purpose of preventing any seaman, while exercising ordinary care for his own safety, from inadvertently falling into said ventilator shaft in the course of his employment, and that said pipe railings constituted a safety appliance for that purpose. If you find from the evidence the said pipe railings constituted all that a reasonably prudent employer would have furnished in the way of safety appliances in and about the ventilator shaft in order to provide a reasonably safe place to work, your finding with respect to said issue of fact must be in favor of the defendant.

Defendant's Proposed Instruction No. 41

Negligence on the part of a defendant cannot be inferred from a presumption of care on the part of the person who has suffered injury or who has suffered death.

Defendant's Proposed Instruction No. 42

The employer of a seaman is not an insurer or guarantor of his safety or life. The design and construction of an appliance is not required by law to be absolutely safe to the end that it is impossible

for a seaman to be injured or to lose his life. The law did not impose upon the defendant an absolute duty of furnishing an accident-proof ventilator shaft.

Defendant's Proposed Instruction No. 43

A steamship operator is not guilty of actionable negligence in the event such operator merely fails to anticipate carelessness or lack of care upon the part of an employee who may suffer injury.

Defendant's Proposed Instruction No. 44

The defendant in this case has admitted that there was no permanent artificial lighting fixture installed in that part of masthouse No. 2 where the ventilator shaft referred to in the evidence was located. In this connection, you are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the inside of said masthouse was in a state of darkness and that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work.

Defendant's Proposed Instruction No. 44-A

You are instructed that the absence of artificial illumination inside of said masthouse is of no importance whatever and must be entirely disregarded by you unless the plaintiff has proved by a preponderance of evidence that the actual visibil-

ity inside of said masthouse, at or immediately before Nathanael P. Hutchison fell, was such that artificial illumination was reasonably required in order to supply him with a reasonably safe place to work.

Defendant's Proposed Instruction No. 45

If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of the defendant with respect to each of plaintiff's claims.

Defendant's Proposed Instruction No. 45-A

If you find from all of the evidence that the pipe railings surrounding the ventilator shaft in masthouse No. 2 constituted a reasonably sufficient safety appliance about said ventilator shaft and that the masthouse was, with the presence of said pipe railings about the ventilator shaft and without any additional safeguard therein or about the same, a reasonably safe place to work and that the plaintiff has failed to prove by a preponderance of evidence that any artificial illumination was reasonably required, your verdict must be in favor of

the defendant as to plaintiff's claims with respect to the place of work.

Defendant's Proposed Instruction No. 46

There is a distinction between contributory negligence and negligence on the part of an employee which is the sole proximate cause of his injury or death. Contributory negligence is of importance in this case only if you find from all of the evidence that the defendant negligently failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place in which to work and that he suffered personal injury and death as a proximate result of such, if any, failure or neglect. In such case, if you so find from the evidence, it is your duty to diminish the damages in proportion to the negligence, if any, on the part of Nathanael Patrick Hutchison proximately contributing to his own injury and death. On the other hand, if you find from all of the evidence that the sole proximate cause of the injury and death of Nathanael Patrick Hutchison was negligence on his part, then your verdict must be in favor of the defendant.

Defendant's Proposed Instruction No. 47

Nathanael Patrick Hutchison was required at all times to exercise that amount of care and caution which would have been exercised under the same or similar circumstances by an ordinarily prudent person to observe and avoid danger. In the absence

of evidence, direct or indirect, to the contrary, the law presumes that he had notice of everything which an ordinarily careful seaman would have known under the same or similar circumstances. If Nathanael Patrick Hutchison did anything which an ordinarily prudent seaman would not have done under the same or similar circumstances or failed to do anything which an ordinarily prudent seaman would have done under the same or similar circumstances then it will be your duty to find that Nathanael Patrick Hutchison was guilty of negligence. If you find that he was guilty of negligence and that such, if any, negligence was the sole proximate cause of personal injury and death, your verdict must be in favor of the defendant with respect to each claim asserted by the plaintiff.

Defendant's Proposed Instruction No. 48

The mere fact that an accident happened, considered alone, does not support an inference that the defendant was negligent.

B.A.J.I. No. 131.

Defendant's Proposed Instruction No. 49

The law does not permit you to guess or speculate as to negligence or as to the proximate cause of the injuries or death of Nathanael Patrick Hutchison. If the evidence on the issue of claimed negligence on the part of the defendant or proximate cause does not preponderate in favor of the plaintiff, then she has failed to fulfill her burden of proof. If after considering all of the evidence you

find that it is just as probable that either the defendant was not negligent or that, if it was, its negligence was not a proximate cause of the injuries or death, as it is that some negligence on its part was such a cause, then a case against the defendant has not been established.

Adapted from B.A.J.I. No. 132.

Defendant's Proposed Instruction No. 50

By the same principle, it follows that if you should find that it is just as probable that Nathanael Patrick Hutchison was free from negligence, or even if negligent, that his negligence did not contribute as a proximate cause of the injury and death, as it is that negligence on his part did contribute as a proximate cause, then contributory negligence has not been established.

Adapted from B.A.J.I. No. 132-A.

Defendant's Proposed Instruction No. 51

In determining whether negligence or proximate cause or contributory negligence has been proved by a preponderance of evidence, you must consider all of the evidence, direct or indirect, bearing either way upon the question, regardless of which party produced it. A party is entitled to the same benefit from evidence that favors his cause or defense when produced by his adversary as when produced by himself. Thus, if the evidence produced by the plaintiff fails to prove negligence on the part of defendant by a preponderance thereof or fails to

prove by a preponderance that Nathanael Patrick Hutchison suffered injury or death as a proximate result of such, if any, negligence, your verdict would have to be in favor of the defendant, even if the defendant has produced no evidence whatever upon the subjects of alleged negligence on its part or proximate cause.

Adapted from B.A.J.I. No. 133.

Defendant's Proposed Instruction No. 52

The disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety cannot be used by you as a basis of a finding that the defendant failed or neglected to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. Therefore, in deciding whether the defendant did or did not fail or neglect to supply reasonably sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work you are precluded from basing a finding with respect to that issue of fact directly or indirectly upon the disputable presumption that Nathanael Patrick Hutchison exercised ordinary care for his own safety.

Defendant's Proposed Instruction No. 53

In the event you find from all of the evidence that Nathanael Patrick Hutchison was not guilty of negligence proximately causing or proximately contributing to his injury and death, you are not entitled to presume or infer from such finding that

the defendant negligently failed or neglected to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work. In other words, the mere fact, if it be a fact, that Nathanael Patrick Hutchison was not guilty of negligence proximately causing or proximately contributing to his injury and death does not justify a finding that his injury and death must have been or was a negligent failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft to provide a reasonably safe place to work.

Defendant's Proposed Instruction No. 54

There was no duty on the part of the defendant to anticipate or provide against a negligent, careless or improper use of any safety appliance or a failure on the part of any seaman to exercise ordinary care in or about the use of any safety appliance actually installed about the ventilator shaft.

Defendant's Proposed Instruction No. 55

A steamship company is not a guarantor or insurer of the safety of a place of work or of the appliances used in connection with the work. It is the duty of a steamship company to exercise reasonable care to the end that the employee be furnished with reasonably safe appliances in order to provide a reasonably safe place to work. The basis of liability on the part of a ship owner is not the single factor of injury or death but whether the

injury or death in the course of employment has been proximately caused or proximately contributed to by a negligent failure on the part of the ship owner to furnish a reasonably safe place in which to work or reasonably safe means of going or coming to and from a place of work.

Defendant's Proposed Instruction No. 55-A

A steamship company is not a guarantor or insurer of the safety of a place of work or of the appliances used in connection with the work. It is the duty of a steamship company to exercise reasonable care to the end that the employee be furnished with reasonably safe appliances in order to provide a reasonably safe place to work. The basis of liability on the part of a ship owner with respect to the place of work or the means of getting to and from the place of work, is not the single factor of injury or death, but whether the injury or death in the course of employment has been proximately caused or proximately contributed to by a negligent failure on the part of the ship owner to furnish a reasonably safe place in which to work or reasonably safe means of going or coming to and from a place of work.

Defendant's Proposed Instruction No. 56

In the instructions which have been given to you and in some which may be given to you the phrase "reasonably safe" is used. A safety appliance is reasonably sufficient in the event it is one which in and of itself would be deemed adequate by an or-

dinarily prudent employer under the same or similar circumstances.

Defendant's Proposed Instruction No. 57

An appliance is reasonably safe when it furnishes such safeguards to life and limb as would be provided by an ordinarily prudent employer under the same or similar circumstances. In other words, a safety appliance is reasonably sufficient if in and of itself it is one which an ordinarily prudent employer of seamen would supply for the purpose of safeguarding a ventilator shaft located inside a masthouse of a vessel under circumstances the same as or similar to those shown by the evidence in this case.

Defendant's Proposed Instruction No. 57-A

An appliance is reasonably safe when it furnishes such safeguards to life and limb as would be provided by an ordinarily prudent employer under the same or similar circumstances. In other words, a safety appliance is reasonably sufficient if in and of itself it is all that an ordinarily prudent employer of seamen would supply for the purpose of safeguarding a ventilator shaft located inside a masthouse of a vessel under circumstances the same as or similar to those shown by the evidence in this case.

Defendant's Proposed Instruction No. 58

You are instructed that the "Linfield Victory" was owned by the United States of America, De-

partment of Commerce, and that it was a "steam vessel". An act of Congress in full force and effect at all times referred to in the evidence in this case provided that all steam vessels owned by the Department of Commerce shall be subject to all of the provisions of Title 52 of the Revised Statutes for the Regulation of Steam Vessels and all acts amendatory thereof or supplemental thereto. An applicable statute enacted by the Congress, in full force and effect in so far as this case is concerned, provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, and cables and other things are faithfully complied with. * * * The statute also provided that whenever the Coast Guard shall find on board any steam vessel such as the "Linfield Victory", as part of the required equipment thereof, any equipment, apparatus or appliances not conforming to the requirements of law, it shall require the same to be placed in proper condition by the owner or master of said vessel, if possible, and that in any of the foregoing cases the Coast Guard official by whom or under whose supervision said vessel is then being inspected shall have power to enforce the foregoing requirements

by revoking the certificate of said vessel, and by refusing to issue a new certificate to the said vessel until the said requirements shall have been fully complied with.

The applicable statute enacted by the Congress also provided that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, before the chief officer of the customs of the district or any other person competent by law to administer oaths. Said statute also provided that such certificate shall be delivered to the master or owner of the vessel to which it relates, and one copy thereof shall be kept on file in the Coast Guard official's office and one copy thereof delivered to the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office. The statute also provided that no vessel required to be inspected under the provisions of Title 52 of the Revised Statute shall be navigated without having on board an unexpired regular certificate of inspection.

You are instructed that it is a presumption of law, in the absence of evidence to the contrary, that there was on board the "Linfield Victory" at all times referred to in the evidence in this case, an unexpired regular certificate of inspection and that such certificate of inspection had been issued by the Coast Guard and that all duties imposed by law

upon the Coast Guard with reference to the inspection of said "Linfield Victory" had been regularly performed and that the Coast Guard had obeyed the law and that the defendant also obeyed the law. Unless these presumptions have been controverted by other evidence, direct or indirect, you are bound to find according to such presumptions.

Defendant's Proposed Instruction No. 58-A

You are instructed that the "Linfield Victory" was owned by the United States of America, Department of Commerce, and that it was a "steam vessel." An applicable statute enacted by the Congress, in full force and effect in so far as this case is concerned, provided that the Coast Guard shall, once in every year, at least, carefully inspect the hull of each such steam vessel, and shall satisfy itself that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, * * * and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life.

The applicable statute enacted by the Congress also provided that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and her equipment throughout, it shall make and subscribe a certificate, which certificate shall be verified by the oath of the Coast Guard official signing it, before the chief officer of the customs of the district or any other person competent by law to administer oaths. Said statute also pro-

vided that such certificate shall be delivered to the master or owner of the vessel to which it relates, and one copy thereof shall be kept on file in the Coast Guard official's office and one copy thereof delivered to the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office. The statute also provided that no vessel required to be inspected under the provisions of said Statute shall be navigated without having on board an unexpired regular certificate of inspection.

You are instructed that it is a presumption of law, in the absence of evidence to the contrary, that there was on board the "Linfield Victory" at all times referred to in the evidence in this case, an unexpired regular certificate of inspection and that such certificate of inspection had been issued by the Coast Guard and that all duties imposed by law upon the Coast Guard with reference to the inspection of said "Linfield Victory" had been regularly performed and that the Coast Guard obeyed the requirements of said statute. Unless this presumption has been controverted by other evidence, direct or indirect, you are bound to find according to such presumption.

Defendant's Proposed Instruction No. 59

You are instructed that regardless of the fact that the "Linfield Victory" was moored to or tied up at a dock at Baltimore, Maryland, on April 24, 1951,

the said vessel was in navigation. You are further instructed that the law presumes, in the absence of evidence to the contrary, that there was on board said vessel at said date an unexpired regular certificate of inspection and that said unexpired regular certificate of inspection had been made and subscribed by a duly authorized official of the Coast Guard and that it had been delivered to the master or owner of said "Linfield Victory". You are further instructed that the law presumes, in the absence of evidence to the contrary, that before the issuance of such certificate of inspection, an inspection of said "Linfield Victory" had been completed by the Coast Guard and that the Coast Guard had approved the vessel and her equipment throughout and that the Coast Guard did, prior to issuing said certificate of inspection, carefully inspect the hull of said steam vessel and satisfied itself that such vessel was of a structure suitable for the service in which she was to be employed and was in a condition to warrant the belief that she could be used in navigation as a steamer, with safety to life, and that all of the requirements of law in regard to fires, boats, pumps, hose, life preservers, floats, anchors, cables, and other things were faithfully complied with and that the said Coast Guard did not find on board said "Linfield Victory" any equipment, apparatus or appliances not conforming to the requirements of law. You must find in accordance with such presumptions unless there is other evidence, direct or indirect, controverting such presumptions.

Defendant Proposed Instruction No. 60

You are instructed that regardless of the fact that the "Linfield Victory" was moored or tied to a dock at Baltimore, Maryland, on April 24, 1951, said "Linfield Victory" was at said time being used in navigation as a steamer; and it is a presumption of law in accordance with which you are bound to find, unless controverted by other evidence, direct or indirect, that the Coast Guard had carefully inspected the hull of said vessel and had satisfied itself that said vessel was of a structure suitable for the service in which she was to be employed and was in a condition to warrant the belief that she might be used in navigation with safety to life and that all requirements of law were faithfully complied with and that it did not find on board said vessel, as part of the required equipment thereof, any equipment, apparatus or appliances not conforming to the requirements of law.

Defendant's Proposed Instruction No. 61

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict. The fact that instructions on the subject of damages have been given must not be considered by you one way

or the other in deciding whether liability does or does not exist.

Adapted from B.A.J.I. No. 180.

Defendant's Proposed Instruction No. 62

Under our practice it is the right of the attorney for each of the parties to present argument to you with reference to the evidence which has been introduced. You are not bound by any argument made by either of the attorneys. No statement made by either attorney during his argument is evidence of any fact in issue in the case.

Defendant's Proposed Instruction No. 63

After you have retired for deliberation, if there be a disagreement between you as to any part of the testimony or evidence which has been introduced or if you or any of you desire to be informed with reference to any point of law applicable to the case, it is your privilege and duty to require the deputy marshal to communicate such fact to the court and you will then be returned to the courtroom for whatever aid the court may give you with respect to any such matter. The foreman of the jury has no power to decide questions of law either for himself or any other member of the jury. If a dispute or uncertainty with reference to any point of law developes during your deliberations, only the court may resolve such dispute. While the foreman of the jury will preside over your deliberations, such foreman has no right or power to decide any question of fact for anyone excepting himself.

Defendant's Proposed Instruction No. 64

You have been instructed that the defendant in this case admits that Nathanael Patrick Hutchison did not meet his death by reason of either foul play or suicide. You are further instructed that you can not infer or presume from the admitted fact that Nathanael Patrick Hutchison did not meet his death by reason of either foul play or suicide that his death resulted in whole or in part from negligence on the part of the defendant or on the part of any licensed officer of the ship or on the part of any agent or employee of the defendant.

Defendant's Proposed Instruction No. 65

Every finding which you make during your deliberations and which is used as a basis upon which you arrive at and render a verdict must be based upon direct or indirect evidence. (At this point the defendant requests the court to insert and read verbatim the provisions of Sections 1831 and 1832 of the California Code of Civil Procedure.)

You are further instructed that you are not entitled to indulge in any presumption from direct or other evidence actually introduced into the record unless the court states to you specifically that you are entitled to indulge in some specific presumption or presumptions. While you are entitled to decide the credibility of a witness you are not entitled to add anything to the actual evidence which has been introduced. In other words, while you may, if you believe you are justified in doing so, disbelieve all or any part of the testimony of any witness who

has testified before you either by way of deposition or in person, you can not add anything to the testimony of any such witness.

Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

Proof is the effect of evidence, the establishment of a fact by evidence.

There are four kinds of evidence:

1. The knowledge of the court;
2. The testimony of witnesses;
3. Writings;
4. Other material objects presented to the senses.

There are several degrees of evidence:

1. Primary and secondary;
2. Direct and indirect;
3. Prima facie, partial, satisfactory, indispensable, and conclusive.

Primary evidence is that kind of a evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents.

Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence.

Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence.

Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts.

A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own preceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Defendant's Proposed Instruction No. 66

You are instructed that there is no obligation resting upon the defendant in this case to produce either in person or by deposition the testimony of any person who may have been aboard the vessel SS "Linfield Victory" at any time while the said vessel was in the Port of Baltimore, Maryland, for

any purpose whatever. You are not entitled to presume or infer that if the defendant had produced, either in person or by deposition, the testimony of any person who may have been aboard the vessel "Linfield Victory" while it was in the Port of Baltimore, Maryland, or any other person who was in the City of Baltimore, Maryland, at any time while the said vessel was at that port that such testimony would constitute any evidence whatever in favor of the plaintiff's claim that the defendant failed to supply sufficient safety appliances in and about the ventilator shaft in masthouse No. 2 to provide a reasonably safe place to work or that the life of Nathanael Patrick Hutchison could have been saved by a surgical operation or any other kind of medical care and attention.

Note: This proposed instruction is also based, in part, upon the proposition that the disputable presumption that higher evidence would be adverse from inferior being proposed is applicable only with respect to the proof of an issue of fact as to which the burden of proof rests upon the particular party who has produced the inferior evidence or has failed to produce all evidence available to such party upon whom the burden of proof rests.

[Endorsed]: Filed October 6, 1955.

[Endorsed]: "A" with exception of 35-A Instructions filed October 12, 1955.

[Title of District Court and Cause.]

QUESTIONS SUBMITTED BY THE JURY

Some jurors recall that someone (?) testified that they had observed screens on the ventilator shafts of other Victory ships. Do you recall any such testimony?—Signed Wm. H. Eager, Foreman.

Is it necessary that the jury find that there was conscious pain and suffering in order to arrive at a verdict for the plaintiff under the first cause of action?—Signed W. H. Eager, Foreman.

Honorable Judge Tolin:

Re-read your instructions regarding failure to conduct a search, and that this form of negligence could apply only to the first cause of action; explain why this cannot apply to the second cause of action.

Read again the two causes of action set forth in the complaint.

Do interrogatories apply only to the second cause of action and not the first? If so, does it follow that contributory negligence on the part of the deceased should not be considered in the verdict as to the first cause of action?

[Endorsed]: Filed October 15, 1955.

[Title of District Court and Cause.]

VERDICT

First Cause of Action (Personal Injuries)

Upon the First Cause of Action, we the Jury find in favor of the Defendant, Pacific-Atlantic Steam-

ship Company, and against the Plaintiff, Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, Deceased.

Dated at Los Angeles, California, this 15th day of October, 1955.

/s/ WILLIAM H. EAGER,
Foreman of the Jury

[Endorsed]: Filed October 15, 1955.

[Title of District Court and Cause.]

VERDICT

Second Cause of Action (Damages for Death)

Upon the Second Cause of Action, we the Jury find in favor of the Plaintiff, Emma Hutchison, Administratrix of the Estate of Nathanael Patrick Hutchison, Deceased, and against the Defendant, Pacific-Atlantic Steamship Company, and fix plaintiff's damages in the sum of Forty-five thousand dollars (\$45,000.00).

Dated at Los Angeles, California, this 15th day of October, 1955.

/s/ WILLIAM H. EAGER,
Foreman of the Jury

[Endorsed]: Filed October 15, 1955.

[Title of District Court and Cause.]

INTERROGATORIES SUBMITTED TO JURY

If the Verdict is in favor of Plaintiff, answer these interrogatories:

Interrogatory No. 1: What are the total pecuniary damages sustained by Emma Hutchison by reason of the death of Nathanael Patrick Hutchison? \$50,000.00.

Interrogatory No. 2: Was Nathanael Patrick Hutchison guilty of any negligence which proximately contributed to his death?

Answer "Yes" or "No": Yes.

Interrogatory No. 3: A. If your answer to Interrogatory No. 2 is "Yes", state the extent in percentage that the negligence of Nathanael Patrick Hutchison proximately contributed to his death.

Ten per cent (10%).

B. Translate the percentage into dollars as a percentage of the amount given by you in answer to Interrogatory No. 1. What is the amount thus computed?

\$5,000.00.

Interrogatory No. 4: Subtract the amount of money stated by you in answer to Interrogatory No. 3-B from the amount of money stated by you in your answer to Interrogatory No. 1. What is the result of this computation?

\$45,000.00.

The handwritten portion of the foregoing constitute answers made by the jury to the typewritten portion which are interrogatories submitted to the jury for its answers.

Dated: October 15th, 1955.

/s/ WILLIAM H. EAGER,

Foreman of the Jury

[Endorsed]: Filed October 15, 1955.

In the United States District Court for the Southern District of California, Central Division
No. 13,569-T Civil

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, Deceased,
Plaintiff,

vs.

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation, et al., Defendants.

JUDGMENT ON THE VERDICT

This cause having been regularly tried by jury duly impanelled and sworn; Raymond C. Simpson, Esq., appearing as counsel for the plaintiff and Lasher B. Gallagher, Esq., appearing as counsel for the defendant; and the trial having proceeded on October 4, 5, 6, 7, 11, 12, 13, 14 and 15, 1955; and the jury having returned on October 15, 1955 its verdict as to the First Cause of Action (Personal Injuries) and the Second Cause of Action, (Damages for Death) to the complaint as follows:

1. As to the First Cause of Action the Jury finds in favor of the defendant and against the plaintiff;

2. As to the Second Cause of Action the Jury finds in favor of the plaintiff and against the defendant and fixes plaintiff's damages in the sum of \$45,000.00;

Now, Therefore, in accordance with the aforesaid premises and said verdicts, and pursuant to law,

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the Defendant as to the First Cause of Action and against the Plaintiff, and that judgment be entered in favor of the Plaintiff as to the Second Cause of Action and against the Defendant, in sum of \$45,000.00 damages and costs taxed at \$125.70.

Witness, the Honorable Ernest A. Tolin, United States District Judge, Southern District of California, this 15th day of October, 1955.

JOHN A. CHILDRESS,
Clerk

/s/ By WM. A. WHITE,
Deputy Clerk

[Endorsed]: Filed, Entered and Docketed October 18, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-
STANDING OR, IN ALTERNATIVE FOR
A NEW TRIAL

The defendant, Pacific-Atlantic Steamship Company, a corporation, hereby moves to have the verdict of the jury on the second cause of action and the judgment entered thereon set aside and to have judgment entered in accordance with its motion for a directed verdict made at the close of all of the evidence or, in the alternative, that a new trial be granted with respect to said cause of action and, to that end, that the verdict and judgment entered

upon said second cause of action be vacated and set aside.

The grounds upon which the defendant moves to have the verdict and the judgment with respect to the second cause of action set aside and to have judgment entered in accordance with its motion for a directed verdict are as follows:

1. The evidence is insufficient to support the implied finding of the jury that at the time Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died the relationship of employer and employee existed between Pacific-Atlantic Steamship Company, a corporation, and Nathanael Patrick Hutchison.

2. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison was a result of any personal injury suffered by him in the course of his employment.

3. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency in and about or in or about the ventilator shaft referred to in Paragraph VIII of the first cause of action incorporated by reference thereto in the second cause of action.

4. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negligence, in its appliances in and about or in or about the ventilator shaft referred to in Para-

graph VIII of the first cause of action and incorporated by reference thereto in the second cause of action.

5. The evidence is insufficient to support the implied finding of the jury that the defendant failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about or in or about said ventilator shaft to provide a reasonably safe place in which to work.

6. The evidence is insufficient to support the implied finding of the jury that Nathanael Patrick Hutchison fell into said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

7. The evidence is insufficient to support the implied finding of the jury that said ventilator shaft was an open ventilator shaft.

8. The evidence is insufficient to support the implied findings of the jury in favor of the plaintiff with respect to the material issues of fact raised by those averments of Paragraphs VII, VIII, and IX of the first cause of action incorporated by reference thereto in the second cause of action and the averments of Paragraph II of the second cause of action which are denied in the answer of the defendant with respect thereto.

9. By reference thereto the defendant incorporates herein each and every ground upon which it made its motion for a directed verdict at the close of all of the evidence with respect to the claimed cause of action designated as the "Second Cause

of Action" in the First Amended Complaint of plaintiff.

10. The evidence fails to show any actionable negligence on the part of the defendant in that there is no evidence, direct or indirect, which will support the verdict of the jury or the implied findings of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negligence, in its appliances in and about or in or about the ventilator shaft located in the forward port section of the port compartment of masthouse No. 2 on the steamship "Linfield Victory".

Said motion to have the verdict and the judgment on the second cause of action set aside and to have judgment entered in accordance with defendant's motion for a directed verdict made at the close of all of the evidence is based upon the foregoing grounds and each thereof; upon the material issues of fact raised by the pleadings with respect to said second cause of action, and upon all of the competent, material and relevant evidence, oral or documentary in the record made during the trial and as shown by the records and minutes kept by the clerk of the court and by the notes of the official court reporter.

In accordance with the provisions of subdivision (b), Rule 50, Federal Rules of Civil Procedure, defendant prays and moves, in the alternative, for a new trial, as follows:

Defendant hereby moves the court for an order and decision setting aside the verdict with respect

to the second cause of action and the judgment entered thereon and that a new trial be granted to the defendant with respect to said second cause of action upon the following grounds and each thereof materially affecting the substantial rights of defendant:

1. Irregularity in the proceedings and conduct of the court.

2. Irregularity in the conduct of and misconduct upon the part of the attorney for the plaintiff.

3. Orders of the court by which the defendant was prevented from having a fair trial.

4. Abuse of judicial discretion by which the defendant was prevented from having a fair trial.

5. Insufficiency of the evidence to justify the verdict.

6. The verdict is against law.

7. Errors in law occurring at the trial and excepted to by the defendant.

7A. Errors in law occurring at the trial, in the following particulars: A. The refusal of the court to strike the averments of Paragraph IX from the first amended complaint. B. Permitting the plaintiff to offer prejudicial and passion arousing evidence with respect to searching for Nathanael Patrick Hutchison in that there was no legal duty imposed upon the defendant to conduct any search for him and the first amended complaint does not contain any averments sufficient to show the existence of any legal duty upon the part of the defendant to conduct any search or that there was any actionable negligence in this respect. C. The refusal

of the court to grant defendant's motion for a directed verdict upon the second count of the first amended complaint. D. The admission into evidence of those portions of the testimony of Amundsen, Castle and Crawford with respect to what such witnesses claimed to have seen on other ships in connection with masthouses or ventilator shafts and with respect to claimed customs or practices and the refusal of the court to require the plaintiff to show any necessity of artificial illumination within masthouse No. 2 on the steamship "Linfield Victory" on April 24, 1951; the admission of improper evidence and the refusal of the court to grant defendant's motions to strike testimony and other evidence in accordance with said motions; and in this respect the defendant by reference thereto incorporates herein each question asked of each witness and other evidence to which an objection was made by the defendant and the objection made thereto by the defendant and the answer to each such question and the motion to strike such testimony and other evidence specified therein as shown by the reporter's notes or transcript of the proceedings at the trial. E. The refusal of the court to allow the defendant an additional 10 minutes on October 13, 1955, to cover essential matters overlooked in the argument of its attorney on the previous afternoon. F. The failure of the court in the instructions given to the jury of its own motion to fairly or completely or at all to state or define the issues of material fact raised by the averments of the first amended complaint and the denials and

averments of the answer to said pleading; the failure of the court to instruct the jury with respect to the statutory bases of possible liability on the part of the defendant as to plaintiff's claim for damages by reason of the death of Nathanael Patrick Hutchison; the failure of the court to instruct the jury with respect to essential elements of actionable negligence on the part of the defendant in connection with and as limited by the averments of a claimed failure or neglect on the part of the defendant to supply sufficient safety appliances in and about the ventilator shaft in the port compartment of masthouse No. 2 to provide a reasonably safe place in which to work; the failure of the court to properly instruct with respect to the specific burden of proof imposed upon the plaintiff or to fully instruct thereon; the refusal of the court to properly or adequately instruct the jury with respect to the duties imposed by law upon the defendant and Nathanael Patrick Hutchison with respect to the subjects of actionable negligence on the part of the defendant, contributory negligence on the part of Nathanael Patrick Hutchison, and negligence on the part of the latter as a sole proximate cause of his injuries and death; the instructions given to the jury by the court of its own motion are incomplete, inadequate, inaccurate and unfair to the defendant and do not cover the law applicable to the legal liability imposed by the Jones Act, the issues of material fact raised by the pleadings or the competent, relevant and material evidence introduced by the respective parties; the

instructions given by the court of its own motion contain much matter which is completely extraneous to proper statements of law which can be given to a jury as the law applicable to the issues and evidence in the case at bar; the court in its instructions made improper, unfair and inaccurate comments with respect to the subjects of actionable negligence on the part of defendant and contributory negligence on the part of Nathanael Patrick Hutchison; the court improperly instructed with respect to disputed questions of fact and also gave contradictory instructions thereon; the court improperly refused to give correct instructions upon the applicable principles of law as requested by the defendant or to give, in lieu thereof, the substance of those portions of defendant's proposed instructions which are not covered in substance or at all in the instructions actually given to the jury; and in particular, the court improperly refused to give or to otherwise correctly or adequately cover the applicable principles of law contained in the following instructions proposed by the defendant and delivered to the court on or before October 12, 1955: Numbers 5, 6, 10, 11, 11A, 12, 13, 14, 14A, 15, 15A, 16, 16A, 17, 18, 19, 19A, 23, 24, 25, 28, 29, 30, 30A, 31, 31A, 32, 32A, 33, 34, 35, 35A, 36, 36A, 38, 39, 40, 40A, 41, 42, 43, 44A, 45, 45A, 47, 49, 51, 52, 53, 54, 55, 55A, 56, 57, 57A, 58, 58A, 59, 60, 65 and 66.

The court improperly refused to submit to the jury and require an answer to defendant's proposed interrogatory number 3: "On what date and at what time on said date did Nathanael Patrick

Hutchison come in contact with the bottom of the ventilator shaft?"

8. Errors in law occurring at the trial as to which the defendant has automatic exceptions pursuant to Rule 46, Federal Rules of Civil Procedure.

9. The evidence is insufficient to support the implied finding of the jury that at the time Nathanael Patrick Hutchison suffered the personal injuries as a result of which he died the relationship of employer and employee existed between Pacific-Atlantic Steamship Company, a corporation, and Nathanael Patrick Hutchison.

10. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison was a result of any personal injury suffered by him in the course of his employment.

11. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency of any appliance or appliances in and about or in or about the ventilator shaft referred to in Paragraph VIII of the first cause of action incorporated by reference thereto in the second cause of action.

12. The evidence is insufficient to support the implied finding of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negligence, in its appliances in and about or in or about the ventilator shaft referred to in Paragraph VIII of the first cause of action and in-

incorporated by reference thereto in the second cause of action.

13. The evidence is insufficient to support the implied finding of the jury that the defendant failed or neglected to supply Nathanael Patrick Hutchison with sufficient safety appliances in and about or in or about said ventilator shaft to provide a reasonably safe place in which to work.

14. The evidence is insufficient to support the implied finding of the jury that Nathanael Patrick Hutchison fell into said ventilator shaft in the course of the performance of any duty as an employee or in the course of his employment.

15. The evidence is insufficient to support the implied finding of the jury that said ventilator shaft was an open ventilator shaft.

16. The evidence is insufficient to support the implied findings of the jury in favor of the plaintiff with respect to the material issues of fact raised by those allegations and averments of Paragraphs VII, VIII, and IX of the first cause of action incorporated by reference thereto in the second cause of action and the averments of Paragraph II of the second cause of action and which are denied in the answer of the defendant with respect thereto.

17. The evidence fails to show any actionable negligence on the part of the defendant in that there is no evidence, direct or indirect, which will support the verdict of the jury or the implied findings of the jury that the death of Nathanael Patrick Hutchison resulted in whole or in part by reason of any insufficiency, due to defendant's negli-

gence, in its appliances in and about or in or about the ventilator shaft located in the forward port section of the port compartment of masthouse No. 2 on the steamship "Linfield Victory".

18. The evidence is insufficient to support the finding of the jury that plaintiff suffered damage in the sum of \$50,000.00.

19. The evidence is insufficient to support the finding of the jury that negligence on the part of the deceased, Nathanael Patrick Hutchison, did not proximately contribute to his death to any extent or in any proportion in excess of 10%.

Said motion in the alternative, for a new trial is based upon the foregoing grounds and each thereof, the material issues of fact raised by the pleadings with respect to the second cause of action, the records and minutes of the clerk of the court, and the notes of the official court reporter, and the affidavit of Lasher B. Gallagher, served and filed herewith.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant Pacific-Atlantic Steamship
Company, a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 25, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Feb. 9, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;

Deputy Clerk: Wm. A. White; Reporter: None; Counsel for Plaintiff: no appearance; Counsel for Defendant: no appearance.

Proceedings: It is Ordered that motion of defendant for judgment notwithstanding the verdict as to the second cause of action, or in the alternative, for a new trial, heretofore taken under submission, be, and it hereby is denied.

Clerk to notify counsel.

JOHN A. CHILDRESS,
Clerk

[Title of District Court and Cause.]

NOTICE OF APPEAL

Defendant Pacific-Atlantic Steamship Co., a corporation, hereby appeals to the United States Court of Appeals, Ninth Circuit, from that certain judgment on the claim designated in the first amended complaint on file herein as the "Second Cause of Action", in favor of plaintiff Emma Hutchison, administratrix of the estate of Nathanael Patrick Hutchison, deceased, and against defendant Pacific-Atlantic Steamship Co., a corporation, in the sum of Forty-five Thousand Dollars (\$45,000.00), and costs, said judgment having been entered in the Civil Docket on October 18, 1955; and also, in the event it is permissible to do so, from the orders entered in the above entitled action on or about February 9, 1956, denying defendant's motion for judgment notwithstanding the verdict as to said

“Second Cause of Action” or in the alternative for a new trial with respect to said “Second Cause of Action.”

Dated: February 27, 1956.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant and Appellant, Pacific-Atlantic Steamship Co., a corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men By These Presents:

Whereas, defendant Pacific-Atlantic Steamship Co., a corporation, has appealed or is about to appeal to the United States Court of Appeals, Ninth Circuit, from that certain final judgment on the cause of action designated in the First Amended Complaint as the “Second Cause of Action” heretofore docketed and entered in the above entitled cause on October 18, 1955; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the plaintiff herein and unto whom it may concern in the sum of Fifty Thousand Dollars (\$50,000.00), for the payment of which well and truly to be made it does hereby bind itself, its

successors and assigns, firmly by these presents and agrees that it is bound for the satisfaction of the said judgment in the principal sum of Forty-five Thousand Dollars (\$45,000.00) in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award.

The condition of this obligation is that if the above named appellant shall successfully prosecute its said appeal, then the above obligations on the part of Fireman's Fund Indemnity Company shall be void; otherwise the same shall be and remain in full force and effect.

Dated: February 24, 1956, at Los Angeles, California.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,

/s/ By MYRON C. HIGBY,
Attorney in Fact

Examined and recommended for approval as provided in local Rule 8.

/s/ LASHER B. GALLAGHER,
Attorney for Defendant and Appellant, Pacific-Atlantic Steamship Co., a corporation

The foregoing bond is hereby approved this 28 day of February, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge

Notary Public Certificate attached.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 107, inclusive, contain the original

Order re Proposed Instructions and Form of Verdict;

Interrogatories Requested by Defendant;

Defendant's Proposed Instructions;

First Amended Complaint;

Motion to Dismiss, Motion for More Definite Statement and Motion to Strike;

Answer to First Amended Complaint;

Interrogatories Requested by Plaintiff of Jury;
Verdict;

Judgment on Verdict;

Interrogatories;

Answer to Interrogatories;

Request for Admissions under Rule 36;

Answer to Request for Admissions under Rule 36;

Verdict on First Cause of Action;

Verdict on the Second Cause of Action;

Interrogatories Submitted to Jury;

Judgment on the Verdict;

Notice of Appeal; Points on Which Defendant Intends to Rely;

Designation of Contents of Record;

Amendment to Designation of Contents of Record; which, together with a full, true and correct copy of the Minutes of the Court had on October 10, 1952; and February 9, 1956; and eight volumes of reporter's transcript of proceedings; deposition of Ernest Kalnin; deposition of Andreas Amundsen; and all exhibits admitted into evidence, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 6th day of April, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division
No. 13,569-T

EMMA HUTCHISON, Administratrix of the
Estate of Nathanael Patrick Hutchison, deceased,
Plaintiff,

vs.

PACIFIC-ATLANTIC STEAMSHIP CO., a corporation, et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 5, 1955

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Raymond C. Simpson and Robert J. Kilpatrick, 110 West Ocean Boulevard, Long Beach, Calif. For the Defendant, Pacific-Atlantic Steamship Co., a corporation, Lasher B. Gallagher, 111 Sutter Street, San Francisco, California. [1*]

* * * * *

“Q. In tonnage and size of ship, is the Liberty ship comparable to the Victory ship?”

Mr. Gallagher: That question, if your Honor please,—

Do you want me to object to these as we are going along?

Mr. Simpson: Yes.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Gallagher: That question is objected to, if your Honor please, upon the ground that there is no proper foundation laid. That is one separate ground.

The next separate ground is that there is no relevancy to the specific issue alleged in the amended complaint, and I call your Honor's attention to an authority upon which your Honor relied when we were handling this same type of evidence in the first trial.

Your Honor read into the record at one time Section 461 of Wigmore on Evidence, third edition, but only read a portion of that section.

And the part that I desire to call to your Honor's attention, in support of my objection, is this: It is subdivision 3, on page 490:

"It is to be remembered that the principles of [5] Relevancy and of Auxiliary Policy (ante, Secs, 442-441) apply here, with the same limitations as in the preceding topics; i.e. (1) The conduct of others must have occurred under circumstances substantially similar, * * * " [6]

* * * * *

Mr. Simpson: Well, there are two points that we would urge in support of the question. One is that by way of preliminary qualifying background, having already elicited from the witness that he is quite familiar with Liberty ships, and that he has been aboard Victory ships, we are asking for the similarity of the two ships.

And that is the reason we ask if they are comparable, having established familiarity with both.

The Court: Of course, your comparability goes to size and doesn't relate to any specific portion of the vessel which is in issue in our particular case.

I think that this particular question is proper, and it will be deemed by this court that the objection is made at the time the deposition is being read in court, so that you need not interrupt the proceedings while we are actually before the jury to state the objections. [7]

* * * * *

The Court: I have given that a considerable bit of thought while this case was before the court of appeals, and the various problems in it have continually come back to me.

Now, that court did not speak upon this particular problem of evidence. What I now feel is that the general subject of holes and whatever is done to protect persons falling into them anywhere, within the area of activity in which the operator of the ship involved in this case would have occasion to note, would be relevant.

I don't think that you can say that what is done on a Victory ship must be done on a Liberty ship. But you can show, as we say in patent cases, the state of the art. [8]

You can show what is within the common knowledge of persons within the general field.

Mr. Gallagher: Well, may I call your Honor's attention to this: I respectfully suggest that your Honor, in your remarks, didn't speak with reference to the point of the objection.

I didn't say that the evidence had to relate to what is done on a Victory ship.

The Court: Oh, I went——

Mr. Gallagher: What I am talking about is the masthouse. That is the only area which is involved in this case and the only area which is referred to in the pleadings.

The Court: I think probably what is done to protect open areas of this kind at other places upon vessels is relevant. The degree of relevancy varies as you get further away from masthouses. It diminishes as you get further away from masthouses.

What is done with respect to hatches on the open deck, I think, would be a relevant line of inquiry.

Mr. Gallagher: May I ask counsel if he is willing to stipulate with respect to every question involving the matters within your Honor's dissertation just now, which is asked of any witness during the course of this trial, either by way of deposition or in open court while the witness is on the stand, shall be deemed to be objected to upon [9] each ground which I have stated here this morning.

And in addition upon the following several, separate and distinct grounds: And when I say "several and distinct" I mean that the objection is not to be considered in the conjunctive, as, for example, when you object to something upon the ground it is incompetent, irrelevant and immaterial, the evidence sought would have to be subject to all three of those grounds. Otherwise, the objection is properly overruled.

So I make the objection, in addition, as follows:

- 1, the evidence is immaterial;
- 2, the evidence is irrelevant;

3, the evidence is incompetent;

4, there is no proper foundation laid;

5, the evidence goes outside of the specific issue with reference to alleged negligence as set forth in the plaintiff's complaint, which refers solely and only to the ventilator shaft in the masthouse No. 2, the allegation being that the defendant negligently "failed and neglected to supply sufficient safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work." [10]

* * * * *

Mr. Simpson: There was a stipulation the last time we were in your chambers that Mr. Gallagher proposed that he would want to have a standing objection to the relevancy and materiality of any questions addressed to any witness on the question of practices elsewhere.

And I said I would stipulate that he could have such an objection, without having the necessity of of posing the objection every time a question is asked.

Mr. Gallagher: Well, I want——

The Court: Of course, his objection as to lack of foundation, I suppose, goes to lack of foundation in that the [11] witness would not have had observation of a masthouse aperture of the nature involved in this particular litigation, unless the witness had specifically stated so.

Mr. Gallagher: That, your Honor, is not inclusively correct. My objection with reference to the subject of foundation is the same as my objection with reference to competency, materiality or rele-

vancy, and it is premised in part upon the rule that the conduct of others must have occurred under circumstances substantially similar to those existing in the case at bar.

Now, counsel may not be willing to stipulate, but will your Honor, in lieu of a refusal to stipulate to my standing objection, now make a ruling that the record shall be deemed to physically include immediately after each question asked of any witness during any deposition or during the oral testimony of any witness, to be physically included in an objection which I then make.

The Court: Insofar as it relates to the subject matter you have discussed in chambers.

Mr. Gallagher: Right here this morning.

The Court: Yes. The court will so understand. And I will, on my own motion, then perhaps disallow the particular questions, because I think Mr. Simpson at the last trial did tend to go a little beyond the limits of legal propriety, but, in general, he was to my view within them. [12]

I am sorry the Appellate Court became so interested in its general chastisement that it did not deal with the specific question which was bound to arise again in this case.

Mr. Gallagher: Now, there is another subject which I would like to have your Honor make a ruling on, so it won't be necessary for me to object during the course of examination of a witness before the jury.

During the last trial Mr. Simpson constantly framed questions as follows: "What is the custom

or what is the practice or what have you observed with reference to safety appliances or safety precautions taken on other ships around openings in the deck or around ventilator shafts in mast-houses?"

Now, I would like the same ruling from your Honor with reference to a standing objection on these grounds:

In the first place, when you ask any witness what is the custom or practice, "or do you know of a custom or practice" you are asking the witness for a conclusion.

I recognize that there may be some cases holding that you can ask a conclusion of a witness with reference to custom and practice, but I take the position that the only way in which to prove custom or practice, in the face of an objection, is to establish a series of things actually observed by witnesses, the sum total of which would enable a jury perhaps to find, as a question of fact, there was a [13] custom or there was a practice.

Now, the next vice in that type of question is this: When the question includes the phrase "safety precautions, safety appliances," or "safeguards" and so forth and so on, that permits the witness to express his opinion with reference to the fact that a certain physical thing on the deck of a ship is actually a safety precaution or a safety guard or a safety appliance.

Now, your Honor will recall various instances of that, and I would like to have my objection to questions which contain those phrases upon the grounds

which I have stated now, and request a stipulation from counsel that my objection shall be deemed to be physically included in the record immediately after each such question is asked, without my repeating it, or in lieu thereof, that your Honor now make an order that the objection upon the grounds which I have stated shall be deemed to be physically included in the record immediately after each such question is asked.

The Court: The court being alerted to the fact you are going to make such an objection, unless we have such an order and being aware, well aware of your philosophy on that subject, will make the order without a stipulation.

I think, though, that this area was generally approached with live witnesses at the last trial.

Mr. Gallagher: It was, your Honor. [14]

Mr. Simpson: Yes, it was.

The Court: Is that going to be true here?

Mr. Simpson: Well, we will only have one live witness on any questions in this area.

The Court: I think custom, if you are going to offer evidence of custom, had better be preceded by a foundation which shows acquaintance with the custom and that words of conclusion should be left out of the questions. Let the witness state them, if there are.

Qualify him as an expert or an observer of extensive observation and I will stop you, without Mr. Gallagher's having to object, if I feel you are going beyond what you should.

There is a great deal of merit in the objection

stated, when it is urged as to a particularly possible type of question.

But since this case was tried last time you have tried a great many more cases, Mr. Simpson, and you probably will, with all of that experience, be able to approach this subject, if you approach it at all, with more finesse.

And I have also tried many more cases, many with Mr. Gallagher, in fact, many of which he has won and some of which he has lost, I think.

Haven't you lost a case? I can't think at the moment of your losing any since the Anderson case, your first case, and [15] the Webster case which immediately followed this case.

Mr. Gallagher: Well, I think I have only tried one case before your Honor since then.

The Court: Well, that was the case of the cook who fell into the bait tank.

Mr. Gallagher: Yes. Now, your Honor, I don't know whether I have made myself clear on this question of asking any witness whether he knows of a custom or practice.

Now, that is not a subject of expert testimony.

The Court: No, that is a subject of knowing of a fact. The fact being a custom or practice.

Mr. Gallagher: Then the question assumes there is a custom or practice and permits the witness to express conclusion that there is such a custom or practice, and if you ask the witness, "Do you know of a custom or practice," or "Is there a custom or practice" then you are permitting the witness to decide for himself what constitutes a custom or

practice, and give his answer to that subject, when he is not qualified to do so.

The Court: The court will require more than the conclusion of the witness. The witness will have to state the extent and nature of his observation and experience with respect to the custom or practice, and then the court will determine whether there is enough substantiality claimed by the witness in his answers that we would be [16] warranted in letting him say that there is a custom or practice, always leaving it, of course, to the jury to determine whether the witness was right on that or not.

Mr. Simpson: Your Honor, there are two things I would like to mention here so we don't get into trouble on them.

One is that while we will do our utmost to make the questions as proper in language as we can, I believe I would like to call the court's attention to the fact there is a danger, if we should go amiss and the court finds it is obligated to wage the defendant's case, by making the objections——

The Court: I am not going to wage anybody's case, Mr. Simpson.

Mr. Simpson: My point is if the objections are not made by Mr. Gallagher, but consistently made by the court, in the eyes of the jury it may have a bad appearance. I hope no objections will be necessary. I just want to mention that.

Mr. Gallagher: I don't think the court will make an objection. All the court will do will be to say,

"I sustain the objection which was made in chambers." That is all.

The Court: I think I would say, in light of the conferences we had in chambers, you better proceed——

Mr. Gallagher: Withdraw the question or——

The Court: ——or you had better place it in a different way, and let him go ahead and place it in a different way. [17]

I will not scuttle either of you by pointing out to the jury any suggestion you are trying to do what you shouldn't, unless you stray much further than has been indicated as the area of possible disagreement here.

Mr. Simpson: Secondly, on this area of discussion Mr. Gallagher has been mentioning, I did want to mention that in going into a custom I want to make sure I understand your Honor's thinking on it.

We go into a custom, and the avenue of exploration will be to qualify the individual by virtue of his background being sufficiently competent and familiar with the activity aboard ship or whatever it might be, so that he would be able to answer the questions.

The Court: Yes.

Mr. Simpson: Might I——

The Court: It requires ships of the general character. It requires apertures of the general character and of the general location. And if there isn't a class of ships which is fairly large which

has apertures of this type at this location, then there can't be a custom with regard to them.

Mr. Simpson: Yes.

Mr. Kilpatrick: The court is not suggesting, however, it will be necessary to go into specific instances in which the witness has participated regarding use of safety appliances, are you? [18]

In other words, the witness doesn't have to dig back in his history and say, "On November 3, 1936,——

The Court: That doesn't show a custom. That shows the witness' own experience.

Mr. Kilpatrick: I think that is Mr. Gallagher's point, unless I misunderstand it.

Mr. Gallagher: I covered all those propositions and intended to in my objection. In other words, to give you an example, I have been on hundreds of cargo vessels in my experience and I have seen various and sundry things.

I don't think I could be asked whether there is a custom or practice or whether there is a custom and practice with reference to any particular thing, and if a witness is restricted to giving a series of specific incidents, which the plaintiff contends will, in their cumulative effect, amount to proof of a custom or a practice, then I think the witness is required to give those specific instances and to describe the particular part of the vessel involved, so as to bring it within an area like the one we have involved here.

For example, what difference would it make what a ship owner did in the engine room of a ship?

The Court: Yes, I see your point, Mr. Gallagher. Of course, that would call upon Mr. Simpson making a very prolonged examination, if he has anything of substance on this particular point. [19]

And in that regard, Mr. Simpson, I am not going to rush you in the case. We have all of this week, we have all next week. If necessary, we will intrude on someone and take more time.

If we have to, we will work late hours. You take whatever time is necessary to follow the *modus operandi* of which Mr. Gallagher says would be error for you not to follow.

Mr. Gallagher: What is going to be your Honor's ruling, or what is your present ruling with respect to these questions which include these words, "safety appliances, safety precautions and safeguards" and so forth?

As I understood your Honor's rulings last time, they were predicated upon the premise that you would allow testimony showing that on a certain ship there was a grating over a ventilator shaft or that there were rails up above the top of a ladder.

Now, those things, if they are proper at all, which I do not concede, should be proved merely by having the witness say, "On such and such a ship I saw up above the vertical members of a ladder continuation rails" and not characterize them as safety appliances.

The Court: I think the words "safety appliances" are definitely words of conclusion.

Mr. Gallagher: I do, too.

The Court: Since this particular trial I [20] have had a number of cases in which that question has arisen, and I have seen cases come down from higher courts where the safety appliances are concerned, and the witnesses are not allowed to characterize it as a safety appliance, but they describe its physical characteristics and then the conclusion that is to be drawn is one which may be suggested to the jury in arguments, but must be reached by the jury in deliberation, rather than by either the court saying that such and such a thing is or is not a safety appliance, or a witness saying it is or is not a safety appliance.

Mr. Gallagher: And the other words are the same, "safeguards, safety precautions," and all that similar type of terminology.

The Court: Yes. I think we had finally reached that in the last case, as the latter part of Mr. Wigmore's dissertation commenced to weigh with me equally with the first part, upon which I had relied at the outset of the case, and then later changed the philosophy of rulings.

Mr. Gallagher: Well, now, we get back to this question we had in the deposition.

Mr. Kilpatrick: Before you get back to that question, Mr. Gallagher, may I state what I understand to be the court's position on this matter of custom? And that is, that a witness who will be asked to testify to a custom will first be qualified by showing his general background, his [21] familiarity with types of ships, his familiarity with types of physical structures on ships around holes

in decks, around ladders, around ventilator shafts, in masts, physical structures in masts and so on.

But that it is not necessary to direct the witness to specific instances which may have occurred in his past and which would unnecessarily — which would be unnecessary since the witness will be able to testify to a broad general familiarity with these matters.

The Court: But the witness should testify to the specific things which he has observed.

Mr. Kilpatrick: With all due respect, I believe the weight of the cases is against such a position. It is sufficient for the witness to show that he is familiar generally with structures aboard ships of this type. That there is no necessity for taking——

The Court: He doesn't have to go through a hundred ships and say, "On such and such a day I observed such and such and extended rail and it was so many inches high," and so on, and simply show it by way of numbers.

But if he is going to tell what he saw on a boat he should tell what he saw definitely in the way of physical description of it, instead of legal conclusion of what it amounted to.

Mr. Kilpatrick: You mean the legal conclusion it amounted [22] to a safety appliance?

The Court: Yes. He shouldn't say that. He can testify as to the custom, if he knows there is a custom.

First, he has to show he knows there is, and that would mean either observation of many ships or

suppose the Coast Guard called in people in his position and said, "Now, the customs of the sea are thus and so," and lectured him on them.

I think you can acquire knowledge of a custom that way.

Mr. Gallagher: That would be hearsay, wouldn't it?

The Court: Well, yes, that would be hearsay, but you can ask him how he knows the custom.

Mr. Gallagher: Suppose he says he knows it——

The Court: He can't tell just what they told him. He can say, "I attended lectures on the subject" if that were the case.

Mr. Gallagher: Well, I would object to any questions about what anybody had heard at any lectures or what anybody else had told him, because that certainly would be hearsay and it would be more than hearsay. It *would repetition* of conclusions.

The Court: He will not be permitted to tell what he heard at the lectures. But he has had a sum total of experience. It might, after we hear it, amount to inexperience. But he will have a sum total of something which might amount to experience. That could include lectures. It could [23] include personal observations. It could include a study of the published literature on the subject. And he would be open to cross examination upon it.

Now, he couldn't tell what he read in any particular piece of literature nor could he tell what he heard in any particular lecture, unless that is probed out of him on cross.

But he can say he had access to such literature or lecture, and he can always tell what he saw.

Mr. Gallagher: Well, I don't want the record to be silent. In the face of your Honor's statement, the defendant respectfully disagrees with what your Honor has said with respect to what would be admissible in the testimony of any witness, in an attempt to establish a custom or practice.

And in the event such questions are asked, I respectfully request that the objection of the defendant to each such question shall, by order of your Honor, be deemed physically present in the record at the end of each such question on each of the following grounds, severally and separately and distinctly, and not in the conjunctive:

- 1, the evidence is immaterial;
- 2, the evidence is irrelevant;
- 3, the evidence is incompetent; and
- 4, the evidence calls for a conclusion and opinion of the witness;
- 5, the opinion and conclusion of the witness [24] is predicated upon hearsay statements or matters which he claims to have read;

6. the introduction of such evidence would deprive the defendant of due process in that due process of law, or, in that the defendant would have no opportunity to cross examine the people who may have made statements to the witness upon which the witness bases a conclusion that there was a custom or a practice.

And with reference to books or periodicals, the books and periodicals couldn't be introduced in evi-

dence. Therefore, any conclusions reached by the witness, as a result of reading periodicals or books, would likewise be incompetent and hearsay.

The Court: The court will understand that such an objection is made to every question of the character which you have referred to.

Mr. Simpson: Might we finish this deposition?

Mr. Gallagher: Not yet we haven't finished with it. I don't know whether his Honor has ruled on that one question yet. I think perhaps you——

Mr. Kilpatrick: I think the court ruled on that question, it is proper.

The Court: I will consider I did. I intended to.

Mr. Simpson: I will continue reading then, beginning with page 8. [25]

* * * * *

Mr. Gallagher: And I think, your Honor, I should have also the further ruling, which I will ask your Honor to make: And that is, that after each answer the record shall be deemed to physically contain a motion to strike each answer given by each witness, either by way of deposition or oral testimony along these same general lines that we have been discussing here this morning, upon each ground stated in the objection to the question.

And that the motion to strike shall be considered as to each ground severally and separately and not in the grounds [27] considered together collectively.

The Court: The court will so understand.

Mr. Gallagher: And whenever the court permits an answer to be read, the record will be deemed to show a denial of the motions.

The Court: Yes.

Mr. Gallagher: And likewise, I think we should have a further ruling whenever the court permits an answer to be made, the record shall be deemed to show physically an order overruling the objection.

The Court: Yes. In reading this deposition, I think the objections might be omitted where it doesn't make any contribution to the continuity.

Mr. Gallagher: I don't think the objections should be read in the presence of the jury.

Mr. Simpson: No. Shall I continue, your Honor?

The Court: Yes. Yes, this proceeding was going to take half an hour. It has now taken 40 minutes.

How much longer is it going to take?

Mr. Gallagher: Well, I think, your Honor, with our understandings with reference to objections and motions to strike your Honor can now proceed to settle this deposition without any further assertion of objections or motions to strike, because they are considered to have been made, in any event. [28]

The Court: Where a live witness can't say it is a safety device, a witness by deposition can't say it, either.

Mr. Simpson: I would like the record at least to show, your Honor, that despite the Court's ruling of the deletion of the word "safety," that at least the plaintiff does object to the deletion.

The Court: You object to the deletion.

Mr. Simpson: Yes.

The Court: You are deemed to object to the fact that the court requires you to not use the expression "safety device".

Mr. Simpson: Yes.

The Court: Now, of course, "safety device" might, under some circumstances, be proper. It would be proper if there is a specific statute or an enforceable regulation which enumerates particular safety devices.

Then what is enumerated therein, it has been legally characterized as a safety device.

Mr. Simpson: Yes.

The Court: But in the absence of that this jury must follow, although it is a maritime standard, it is sort of comparable to a common law standard, and I think the basic test is whether the operators of the vessel in question used reasonable care.

Mr. Simpson: From that would I understand that the court could not then properly instruct the jury they are required [29] to provide a reasonably safe place?

The Court: Oh, I will instruct them they are required to use reasonable care to provide a reasonably safe place.

Mr. Gallagher: Will your Honor defer ruling on that until you settle the instructions?

The Court: All right. But that is my present intention. I think that is part of the law. They are required to use reasonable care to provide a reasonably safe place, aren't they?

Mr. Gallagher: There is no allegation in the complaint there was a failure or negligent failure or any failure to provide a reasonably safe place to work. It is tied up irrevocably in the complaint that the defendant failed and neglected to supply

“safety appliances in and about said ventilator shaft to provide a reasonably safe place in which to work” and that is different from a general requirement to provide a reasonably safe place to work.

The Court: I think it is apparent from the pleadings they are alleging a negligent failure to provide a reasonably safe place to work, with regard to not having safety appliances at the points of the ship in question, and I am not going to let the trial come down into a holding of either party to the most strict dictionary definition of words. Substantial justice, legal justice is never accomplished by that. [30]

* * * * *

Mr. Gallagher: May I call your Honor's attention to a particular part of that answer on page 9, which is more than ordinarily vicious. The last words of the answer, “to see that these practices are carried out.”

That certainly——

The Court: That is common.

Mr. Gallagher: That is a conclusion.

The Court: Yes, the giving of a bulletin is not a follow-up on it. I think that part, that particular objection of Mr. Gallagher's is good.

Mr. Simpson: Then do I understand the court is striking that phrase?

Mr. Gallagher: Yes, “to see that these practices are carried out.”

Mr. Simpson: In lines 12 and 13?

Mr. Gallagher: On page 9 of the Castle deposition.

The Court: To give "bulletins every month to its ships' officers, especially the chief mates."

Everything after that I think should be omitted from the reading, that is, of that answer, "to see that these practices are carried out."

Mr. Simpson: Shall I continue to read at line 14? [31]

The Court: I think Mr. Gallagher said it isn't necessary, in view of the expressions you have stated, that the words "safety device" should not be used or "safety appliance."

* * * * *

Mr. Gallagher: I object to that question specifically upon the ground, and note that there is no occasion for illumination in the absence of proof that a particular place is dark. In other words, a proper foundation would have to be laid showing that the masthouse was in a state of darkness at any time when Mr. Hutchison was required to use it, in the course of his employment.

The Court: Or might properly use it.

Mr. Gallagher: That would be included. Course of employment, I think, is thoroughly understood by all of us; what the courts have said it means. But my particular point here is this: Light is not required unless a place is dark.

And in the absence of proof that a place of work, we will say, is dark, there is no relevancy to any evidence with reference to artificial illumination.

The Court: Well, to require, or, to say that a light is not burning in a place that the evidence shows is lighted is, I think, something that any jury

of reasonable intelligence would be able to appreciate.

Mr. Gallagher: Let me put it this way, your Honor: You go home occasionally in the daytime and your house has windows and has shades, and let's say that the shades are all up in your house.

The physical fact and the physical law demonstrates there is a diffusion of light. We go into your house in the daytime, [33] with the shades up. You don't turn on lights; you don't need them.

My point is this: With reference to this particular masthouse, on this particular ship, the question of permanent lighting fixtures, or the question of temporary lighting fixtures would not be material or relevant, in the absence of proof showing that at any time when Mr. Hutchison was required to be there——

The Court: No, but it doesn't create any harm to show it.

Mr. Gallagher: Well, I think it does. I would like to state my full objection, your Honor.

The Court: I don't think that the witness can say whether it is proper illumination or not. He can state the degree of illumination.

And I suppose, if there is a claim here, Mr. Simpson—and I don't remember—the masthouse was dark, that you are going to have live evidence to show it.

Mr. Simpson: Yes, your Honor.

The Court: Are you going to start out with live evidence.

Mr. Simpson: We are starting—we will take three depositions in a row.

The Court: Can you take the others first?

Mr. Simpson: We can.

The Court: I don't like to ask a jury to come in at [34] 10:15.

According to your prospectus yesterday I could have had them come a quarter of 10:00 and we would have been through with it.

Since we have come in here, it has turned out we have been almost an hour now and we still, on my estimate, have probably half an hour to go.

I would like to defer further proceedings out of the presence of the jury until some later time.

Mr. Simpson: The only problem is in the opening statement to the jury I am placed in an awkward position, without this deposition being settled, in perhaps telling them we will prove something based on the deposition and then if your Honor doesn't permit it to come in Mr. Gallagher will argue——

The Court: All right. How much more of the deposition is there? Do you contend the word "proper" is something that the witness could conclude?

Mr. Simpson: Since it pertains aboard ships in general, rather than to this specific one, so he is not asked to draw a conclusion as to whether there was proper light aboard the Linfield Victory, I would think it might be a proper question.

Mr. Gallagher: In the absence of substantive evidence of darkness in the masthouse at the time they

claim that Mr. Hutchison was in it and at the time they claim he fell into [35] the ventilator trunk, the question of illumination is improper and there is no proper foundation laid.

I can give your Honor a case on that which holds that before you can go into the question of artificial illumination you first have to show it is dark.

The Court: Of course, that would be in light of the presumption that the triers of fact are reasonable men and women. It would be a rule of expediency.

Here we are just taking up a lot of time of useless objection with things that are obvious to any reasonable man.

Mr. Simpson: There are approximately four more pages, your Honor, of the deposition.

The Court: Go through them fast.

Mr. Simpson: Do we have a ruling by your Honor on this last one?

Mr. Gallagher: The question starting on line 11, page 11. That certainly calls for a conclusion.

The Court: I think "proper" is not a word which can legally be used in that question.

I don't know. It has been a long time since I read this deposition. I hadn't been alerted to the necessity of this until you asked for this conference, whether you have laid a foundation as to observation sufficient to establish a knowledge of custom.

I was about to suggest, you don't have to follow the [36] suggestion, but if you do have that foundation that "usually" would be a proper word to use, instead of the one that you have.

Mr. Gallagher: Well, the trouble with that, your Honor, is this: When that question was asked, at the time the deposition was taken, I objected to it as follows:—

The Court: I am aware of your objection, Mr. Gallagher.

Mr. Gallagher: On lines 14 to 17 on page 11. Now, I didn't cross examine this witness with reference to that subject, because I was convinced the objection was good, and that the court wouldn't permit that question as asked to be read to any jury.

The Court: Well, the court will not permit it as asked. If you can get some agreement with Mr. Gallagher, as to a modification and have it stipulated that the witness shall be deemed to have so stated, I will accept that.

But the question as asked is not a lawfully proper question.

Mr. Gallagher: I can't make any agreement with reference to changing it, because I would then have no opportunity to cross examine.

The Court: All right, then. He says he won't agree. Let's not argue. [37]

* * * * *

"Q. Did you examine the masthouse with the hatch door closed?

"A. The mate——"

Mr. Gallagher: I object to that question upon the ground that it is immaterial, in that there is no evidence proving or tending to prove that the hatch door was closed at any time while Mr. Hutchi-

son was within the masthouse or within the escape shaft in masthouse No. 2.

The Court: Overruled.

Mr. Simpson:

“A. The mate and I closed the hatch door to see just how dark it was in there. It was quite dark, and this was in late forenoon.” [41]

The Court: The court deems there is a motion to strike that.

Mr. Gallagher: Yes, your Honor.

The Court: And it is denied.

Mr. Simpson: Next turn to page 19, commencing at line 17.

“Q. Did you note any screen or other protective covering surrounding the ventilating shaft?”

Mr. Gallagher: Now, we have that word “protective” in there, your Honor.

The Court: You can’t, in the course of reasonable, careful professional handling of these things avoid all adjectives. I will allow it in this question over your objection.

Mr. Simpson:

“A. There was no screen over the ventilating shaft at all, it was open on the top. There was a broken screen on the bottom, the hold end of it, the lower end.”

And that is all we offer of this deposition.

The Court: That is all you are going to read?

Mr. Simpson: Yes.

The Court: All right. Well, the jury has been kept a half-hour. [42]

* * * * *

Mr. Simpson: The first witness for the plaintiff will be Andreas Amundsen, and the testimony will be by way of reading the deposition of Andreas Amundsen.

DEPOSITION OF ANDREAS AMUNDSEN

Deposition of Andreas Amundsen, taken before Leo E. Miller, a Notary Public in and for the City and County of San Francisco, State of California, commencing at 10:45 o'clock a.m., Friday, July 18, 1952, in the Merchants Exchange Building, 465 California Street, San Francisco, California, pursuant to oral stipulation.

* * * * *

“Would you state your name?”

Mr. Kilpatrick: “Andreas Amundsen.”

Mr. Simpson: “Are you married, Mr. Amundsen?”

Mr. Kilpatrick: No.

Mr. Simpson: “And do you expect to take employment on a vessel when the opportunity presents itself again?”

Mr. Kilpatrick: “Well, if I could go back to sea, yes.”

Mr. Simpson: “How long have you been going to sea?”

Mr. Kilpatrick: “22 years.”

Mr. Simpson: “That is your usual occupation, is it, as a sailor?”

Mr. Kilpatrick: “Yes, A.B.”

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Do you remember serving on the Linfield Victory?"

Mr. Kilpatrick: "Yes, sir, I was there almost six months."

Mr. Simpson. "I see. And do you remember knowing a man known as Nathanael Hutchison?"

Mr. Kilpatrick: "Yes, sir."

Mr. Simpson: "And when did you first know this man?"

Mr. Kilpatrick: "Well, Scotty come aboard there, and it was back east, and I never seen him before in my life, but we was working together on board the ship; we get interested, and start joking together."

Mr. Simpson: "You refer to the name of Scotty?"

Mr. Kilpatrick: "I didn't know the first name. I asked him, 'What's your name,' you know. 'They call me Scotty.'"

Mr. Simpson: "I see. That was Nathanael Hutchison's nickname, was it?"

Mr. Kilpatrick: "Yes, sir."

Mr. Simpson: "And you say he joined the ship. Did you mean by that the Linfield Victory?"

Mr. Kilpatrick: "Yes, sir, that's where we were shipmates, you know."

Mr. Simpson: "Now, you said the ship was back east?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Can you be more particular about what port it was when you first met Scotty?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "It was in Baltimore."

Mr. Simpson: "In Baltimore. Now, directing your attention to the port of Baltimore where you say the ship was, Scotty was part of the sailor's gang, was he?" [67]

Mr. Kilpatrick: "Yes, he was the maintenance man."

Mr. Simpson: "The maintenance man, but he did more or less the same work as you did?"

Mr. Kilpatrick: "Oh, yes."

Mr. Simpson: "Now, while you and Scotty were on the ship can you recall any occasion when you were both working in the hold together?"

Mr. Kilpatrick: "Well, you mean when we were down cleaning holds?"

Mr. Simpson: "Yes."

Mr. Kilpatrick: "Well, we started on—well, like every day we were working together."

Mr. Simpson: "I see."

Mr. Kilpatrick: "And—well, I don't know—that special morning we were down there like any other day. The boatswain turned us to at 8:00 o'clock, and we went down there and cleaned holds, and the boatswain come and knocked us off for coffee time."

Mr. Simpson: "Do you remember what hold it was?"

Mr. Kilpatrick: "No. 2."

Mr. Simpson: "And you were down in the hold?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Was Scotty with you?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Yes, sir."

Mr. Simpson: "From 8:00 o'clock in the morning?" [68]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Would you continue with your answer? What happened next?"

Mr. Kilpatrick: "Well, then we worked, and so the boatswain come and knocked us off about 10:00 o'clock, 'Come up for coffee.'"

Mr. Simpson: "You say you came up for coffee. How did you come up from the hold?"

Mr. Kilpatrick: "Well, we come up the access ladder there on the mast house."

Mr. Simpson: "Where is that access ladder located with respect to the hold you were working in?"

Mr. Kilpatrick: "It is on the port side."

Mr. Simpson: "You say it is on the port side?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "On the port side of the hold? You are speaking now of the door?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Is it forward or after in the hold?"

Mr. Kilpatrick: "It is in the after part of No. 2 hold."

Mr. Simpson: "And when you came up for coffee time you say you used that access ladder?"

Mr. Kilpatrick: "The same—we come up—yes, sir, we come up the same way as we went down at 8:00 o'clock in the morning, through the access ladder or the mast [69] house ladder."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Yes, they are all in the same place, is that what you mean to say?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Will you tell us what happened then? You went up for coffee time; did Scotty go with you?"

Mr. Kilpatrick: "Yes, sir, and we walked on the deck together; went in and had coffee; were sitting there talking, you know, joking. Well, it was about fifteen minutes after 10:00 o'clock, we went into Scotty's—what they call a forecastle, you know, his home."

Mr. Simpson: "Did Scotty seem to be in good spirits?"

Mr. Kilpatrick: "Well, he was just like me; and went up for breakfast."

Mr. Simpson: "Continue, and tell us what happened."

Mr. Kilpatrick: "So, we went in Scotty's home and sat down, and we had a smoke. I sit down there and had a smoke. So, he asked me, he said, 'You going to go ashore tonight?' And so—well, he said, 'I got a couple of dollars.' So he took his wallet up and he show me he——"

Mr. Simpson: "Just go on."

Mr. Kilpatrick: "So he show me the money he had in his pocket. It was about, oh, \$25.00 or \$30.00 in this; then he opened up the papers, and he had a hundred-dollar [70] bill in there, and he showed it to me, a brand new hundred-dollar bill, folded up. So, he said, 'Well, Andy, I got money, if you want

(Deposition of Andreas Amundsen.)

to go ashore tonight. You can always pay me back later.' So, well, then, the boatswain come and told us to turn to again."

Excuse me. Is there any one on the jury who cannot hear my voice?

(No response.)

Mr. Simpson: "And while you were with Scotty in his fore-castle, and smoking, did you have an opportunity to observe his condition as to sobriety?"

Mr. Kilpatrick: "He was sober, and he was joking, and he was happy."

Mr. Simpson: "And were you sober that morning?"

Mr. Kilpatrick: "Yes, sir. I didn't even go ashore."

Mr. Simpson: "Now, would you tell us what happened after you finished coffee?"

Mr. Kilpatrick: "Well, then the boatswain come and said, 'Well, boys, let's go.' So, we went back the same way, down the shaft alleyway, I call it, you know, aboard the ship."

Mr. Simpson: "You went back the same ladder that you came up?" [71]

Mr. Kilpatrick: "Yes, and we start working again like we did before all morning, same thing, cleaning holds, sweeping and picking up papers, and making a pile over there so when they open up the hatches they take it out and put it on deck.

"So—well, we were working there, so Scotty says, 'Well, I'm going to go up on deck and get a drink.' So, he walked back there where—I saw him walk

(Deposition of Andreas Amundsen.)

up, because I saw him go out the door and walk up the ladder, and so we worked there. So, well, we went up for lunch—to eat dinner. That was about, you know, around 11:00. The boatswain come in and knock you off, so we went up on deck the same way. We walk up the same—you know, up and down all morning. So, we went and washed up and went in the mess hall and eat dinner.”

Mr. Simpson: And did you go back down in the hold to work after dinner?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “Was Scotty with you?”

Mr. Kilpatrick: “No.”

Mr. Simpson: “When was the last time that you saw Scotty?”

Mr. Kilpatrick: “Well, that was around 11:00 o’clock, or something like that.” [72]

Mr. Simpson: “That was when he came back down into the hold with you, after coffee time?”

Mr. Kilpatrick: “That was at 10:30.”

Mr. Simpson: “At 10:30, and it was sometime later, but before lunch, that Scotty went back up?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “Did you notice what route he took?”

Mr. Kilpatrick: “The same way.”

Mr. Simpson: “Through the door?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “And that is the last you saw him?”

Mr. Kilpatrick: “Yes.”

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And did you say anything to him as he left?"

Mr. Kilpatrick: "I can't remember now. I may have said something."

Mr. Simpson: "When did you next see Scotty after this?"

Mr. Kilpatrick: "Well, I may have seen him up in the dining room, I'm not sure."

Mr. Simpson: "I mean, after this—after this day we are talking about, when did you next see Scotty again?"

Mr. Kilpatrick: "You mean after he was dead?"

Mr. Simpson: "Yes."

Mr. Kilpatrick: "That was—that was up in Philadelphia."

Mr. Simpson: "How many days?" [73]

Mr. Kilpatrick: "About five days."

Mr. Simpson: "Where was he when you saw him in Philadelphia?"

Mr. Kilpatrick: "He was in the shaft alley."

Mr. Simpson: "That was in this mast house, was it, that you have been referring to?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And he was at the bottom of something that you referred to as a ventilating shaft, or a shaft alley, is that correct?"

Mr. Kilpatrick: "Yes—not shaft alley, no. I mean ventilator shaft."

Mr. Simpson: Excuse me one second, your Honor. I want to get the photographs that are referred to here that were marked.

(Deposition of Andreas Amundsen.)

"I am showing you a man looking up through a hole, and I will ask you——"

Mr. Gallagher: Excuse me. "I am showing you a photograph".

Mr. Simpson: Thank you. "I am showing you a photograph showing a man looking up through a hole, and I will ask you if you can identify that photograph, what it purports to be. Does that look like the ladder that you used?"

Mr. Kilpatrick: "That is the ladder we were talking [74] about, if this is the mast house number two, yes."

Mr. Simpson: Might we at this time, your Honor, have this, which has been marked for identification, offered in evidence as Plaintiff's 1.

Mr. Gallagher: No objection. Will you stipulate with me that is Mr. George Wise, whose picture shows in that photograph——

Mr. Simpson: So stipulated.

Mr. Gallagher: —your partner and one of the plaintiff's attorneys.

Mr. Simpson: That is correct.

The Court: It is admitted in evidence.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.) [75]

* * * * *

Mr. Simpson: Beginning with the 14th line, then, and continuing with reference to Plaintiff's 1 which has been introduced:

"Did mast house number two look like that on the Linfield Victory?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Yes." [82]

Mr. Simpson: "And, so far as your memory serves you, that is an accurate reproduction of the top of the ladder at the mast house number two, isn't it?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: May I offer this?

Mr. Gallagher: May I see that one, please?

Mr. Simpson: Yes.

Mr. Gallagher: No objection to the photograph.

The Clerk: Plaintiff's 2.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 2 and received in evidence.)

Mr. Gallagher: Your Honor, while the jurors are looking at that photograph, I would like to amend my statement.

I have no objection to the photograph, excepting to refer to marks that have been placed on for the purpose of comparison with other vessels and that, of course, is subject to the same objection.

The Court: Well, it will suffice, will it not, if the jury is told to look at a photograph and not any of the markings which have been placed on it?

Mr. Gallagher: Yes, your Honor.

The Court: Disregard the markings on the photograph. Look at the photograph. That is all that is in evidence. The markings are those put there by counsel for their purposes, [83] and it is not in evidence.

(Deposition of Andreas Amundsen.)

Mr. Gallagher: By the witness.

The Court: It doesn't make any difference by whom. They are to disregard the markings.

Mr. Simpson: "Now, you said, I believe that you have been serving on vessels for over twenty-two years?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Have you been on other ships that have access ladders in the mast house?"

Mr. Kilpatrick: "Oh, yes, sure I have."

Mr. Simpson: "Looking at the exhibits which you have identified, and which have been marked as Amundsen A and Amundsen B, I'll ask you if the arrangement of guard rails appears to be the same or different than those on other ships that you have served on?"

Mr. Kilpatrick: "On other ships the bars go right across here."

Mr. Simpson: "Now, when you said, 'right across here,' will you indicate again what you mean by those words?"

Mr. Kilpatrick: "They go out across like this here, not like this."

Mr. Simpson: "The witness is pointing now to the hole on the right hand side of the photograph marked number—marked Amundsen B, which appears to be enclosed by the bars." [84]

Mr. Kilpatrick: "Well, those like this now go right across here; so, in other words, when you want to go down there you had to jump over there."

Mr. Simpson: "I'll give you a pen, Mr. Amund-

(Deposition of Andreas Amundsen.)

sen, and ask you to mark on the exhibit for identification, B, where the bars have been on other ships, as you have testified."

Mr. Kilpatrick: "Right across."

Mr. Simpson: "Right across like that? Now, would you mark each one of those with your initials, those lines that you have drawn?"

"Now, which one of these holes was it that you stated Hutchison was found in?"

Mr. Kilpatrick: "In the forward one."

Mr. Simpson: "You are referring — when you say the forward one, you are referring to the right hand hole in the photograph, Amundsen B?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "For the record, that is——"

Mr. Gallagher: Pardon me, Mr. Simpson. Don't you think you should identify Amundsen B as Plaintiff's Exhibit Number 2 here?

Mr. Simpson: Yes, I think that is very good, Mr. Gallagher. Let the record so show.

"The record, that is the one that is called——"

Mr. Gallagher: Isn't it "For the record"?

Mr. Simpson: Pardon?

Mr. Gallagher: "For the record".

Mr. Simpson: That is what I said.

Mr. Gallagher: Pardon me. I didn't hear the first word.

Mr. Simpson: "For the record, that is the one that is called the ventilator shaft?"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "As differentiated from the one with the ladder?"

Mr. Kilpatrick: "Well, both of them."

Mr. Simpson: "Yes?"

Mr. Kilpatrick: "Both, see. The mast head is inside there, because the ventilator—that is called the ventilator——"

Mr. Simpson: "I'm trying to ask you——"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "He was found in the ventilator shaft, not the one with the ladder, is that it?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "For the sake of clarity, let's mark it. Mark with a large V the ventilator shaft. Just put a V there."

Mr. Kilpatrick: "V?"

Mr. Simpson: "Yes, and then——" [86]

Mr. Kilpatrick: The witness draws on the photograph at that point.

Mr. Simpson: "I see you have drawn what appears to be a W, Mr. Amundsen. I mean a V, as in Victor. W and V are very similar in the Norwegian language.

"Why don't you write in, 'ventilator'?"

"Yes.

"You write it in.

"I'll write 'ventilator' on the side——"

Mr. Gallagher: "On the inside".

Mr. Simpson: "——the inside where the ventilator shaft was. I guess I should have used my ball point.

(Deposition of Andreas Amundsen.)

"Now, that is correct, is it not, Mr. Amundsen, the way it is written now, the ladder on the left and the ventilator to the right?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Was there any ladder in the ventilator?"

Mr. Kilpatrick: "Not to this one, no."

Mr. Simpson: "You started to tell us that the arrangement shown in this photograph was different from the arrangement that you have noticed on other ships that you have served on, correct?"

Mr. Kilpatrick: "Yes. You mean the bars?"

Mr. Simpson: "Yes. You testified that the bars went right across?" [87]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Now, is there anything else that was different in the arrangement of the Linfield Victory from the arrangement that you are familiar with on other ships?"

Mr. Kilpatrick: "Well, other ships got screens down here, and stuff like that."

Mr. Simpson: "When you say 'down here', where are you pointing?"

Mr. Kilpatrick: "Well, over a hatch. I mean, it is—you know——"

Mr. Simpson: "The witness is pointing——"

Mr. Kilpatrick: "Over the opening."

Mr. Simpson: "You say, 'the opening', you are referring to which opening, the ladder opening or the ventilator opening?"

Mr. Kilpatrick: "Here, the ventilator."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Have you seen on other ships, in mast houses, a ventilator opening without a ladder going down it?"

Mr. Kilpatrick: "No. This is the first time I ever seen it."

Mr. Simpson: "Now, you have stated that on the ships you have been on the bars go all the way across?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "In the manner that you have drawn them here?" [88]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And I believe you started to say that to get down you had to do something?"

Mr. Kilpatrick: "Climb over."

Mr. Simpson: "You had to climb over them, is that right?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "What was the method of illumination in this mast house, if you can remember?"

Mr. Kilpatrick: "What do you mean?"

Mr. Simpson: "Do you remember whether there were any artificial lights?"

Mr. Kilpatrick: "No, I don't remember that."

Mr. Simpson: "On the basis of your acquaintanceship with Hutchison how many days was that, roughly?"

Mr. Kilpatrick: "Oh, I can't remember that now."

Mr. Simpson: "You served together on this ship more than one day, did you?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Oh, yes, yes."

Mr. Simpson: "Well, was there anything about—odd about Hutchison's manner at any time when you knew him?"

Mr. Kilpatrick: "No."

Mr. Simpson: "And when you last saw him, did he appear to be——"

Mr. Kilpatrick: That is "how".

Mr. Simpson: "——how did he appear to be as to [89] sobriety?"

Mr. Kilpatrick: "Fine, fine."

Mr. Simpson: "Fine?"

Mr. Kilpatrick: "Fine."

Mr. Simpson: "Good spirits?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "I believe that's all, Mr. Schal-dach." Now, continuing with cross examination, your Honor.

"How many days had you been working down in the number two or number three hold, prior to the 24th of April?"

Mr. Kilpatrick: "I think that was the first morning we went down there. I mean, 8:00 o'clock in the morning, because we clean up all the holds, but I can't remember if we was there the night before, you know."

Mr. Simpson: "Was the hold open?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Was it covered?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "How much of it was covered?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Everything."

Mr. Simpson: "All of it was covered?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "I see. So you went down through what they call the escape hatch?" [90]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Now, the escape hatch on this Linfield Victory goes through the mast house?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And there are two doors, aren't there, on the mast house?"

Mr. Kilpatrick: "There is three or four doors, but the only one that goes down to the—opens up for the—to go down here."

Mr. Simpson: "I see. There are four doors on this mast house?"

Mr. Kilpatrick: "Well, there is one to the lamp locker, and, you know, you put tools in one, and stuff like that."

Mr. Simpson: "All right. In the morning when you went down there to work on the number two—in the number two hold, how many men went down?"

Mr. Kilpatrick: "About four. Four or five."

Mr. Simpson: "Four or five?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And how did you go down?"

Mr. Kilpatrick: "We went down this escape——"

Mr. Simpson: "Escape hatch?"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And you went in through the midship doors—one of the midship doors?" [91]

Mr. Kilpatrick: "No, that is another door that is on the port side there."

Mr. Simpson: "On the port side?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "In the midship house?"

Mr. Kilpatrick: "Well, number two——"

Mr. Simpson: "Mast house?"

Mr. Kilpatrick: "That's right, number two mast house."

Mr. Simpson: "All right. And you opened the door?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And when you opened the door you saw those bars, didn't you? You saw a stanchion there and these two sets of pipe rails there?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "They are indicated on this picture."

Mr. Kilpatrick: The identification is made as Exhibit B, which is——

Mr. Simpson: Plaintiff's 2.

Mr. Kilpatrick: ——Plaintiff's 2 for this deposition.

Mr. Gallagher: For this trial.

Mr. Kilpatrick: For this trial.

The Court: Is that the picture the jury is looking at now?

Mr. Kilpatrick: It is the one that the jury just completed looking at, your Honor. [92]

(Deposition of Andreas Amundsen.)

Mr. Simpson: Just looked at it.

“And those two pipe rails——”

The Court: Since there is continual reference to objects on that picture, it might be well to keep circulating the picture in the jury box, to keep reasonably abreast of the testimony.

Just pass it from one to the other, so your minds keep refreshed on the subject the witness is testifying about.

Mr. Simpson: “And those two pipe rails and the stanchion were all there at the time?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “At the time that you first went down there in the morning?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “Will you mark that ‘rails’? Put ‘rails’ right there.”

Mr. Kilpatrick: The witness draws on the photograph.

Mr. Simpson: “All right. Now, those are not movable, are they?”

Mr. Kilpatrick: “No.”

Mr. Simpson: “They are welded right to the side of the vessel, or the bulkhead?”

Mr. Kilpatrick: “Yes.”

Mr. Simpson: “And the stanchion is welded in place?”

Mr. Kilpatrick: “Yes.” [93]

Mr. Simpson: “And how high is that top rail from the level of the floor or the deck?”

Mr. Kilpatrick: “You mean this? (indicating.)”

(Deposition of Andreas Amundsen.)

Mr. Simpson: "Yes."

Mr. Kilpatrick: "I don't know how many feet."

Mr. Simpson: "How high is the stanchion?"

Mr. Kilpatrick: "You mean this stanchion here?"

Mr. Simpson: "Yes."

Mr. Kilpatrick: "I don't know."

Mr. Simpson: "Over three feet in height?"

Mr. Kilpatrick: "Yes, I guess so."

Mr. Simpson: "Do you want to measure his hands?"

"About three feet?"

Mr. Kilpatrick: "Yes."

And "Witness demonstrates with his hands."

Mr. Simpson: "Yes."

Then "And do you know who went down that escape hatch ladder first that morning, when you first went down?"

Mr. Kilpatrick: "No, that I can't remember now."

Mr. Simpson: "You don't recall the order in which you went down?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "But you went down?"

Mr. Kilpatrick: "Yes." [94]

Mr. Simpson: "Hutchison went down?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "The boatswain, Kalnin, went down?"

Mr. Kilpatrick: "Not right then, I don't think."

Mr. Simpson: "Did he come down there?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Maybe he did, to show us what to do, yes."

Mr. Simpson: "And a couple of other ordinaries, or A.B.'s went down?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And you went down that ladder?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "You got down to the bottom hold and opened the door and came into the hold of the vessel, number two hold?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "All right. Now, did you come up that ladder for coffee?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "All of you come up?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Including Hutchison?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And you made it up all right?"

Mr. Kilpatrick: "Yes." [95]

Mr. Simpson: "Did you have coffee?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "What time was that?"

Mr. Kilpatrick: "10:00 o'clock."

Mr. Simpson: "And then you said you went and had a smoke in Hutchison's quarters?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Then the boatswain turned you to again?"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And you went back down this same ladder?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And how many of you went down?"

Mr. Kilpatrick: "The same crew, same gang."

Mr. Simpson: "And were those rails that you have marked on that particular exhibit, Exhibit B for identification,——"

Being Plaintiff's 2 in this instance.

"——there present at that time?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And you went down without any incident? Nothing happened on the way down?"

Mr. Kilpatrick: "No."

Mr. Simpson: "You went down and started to work again down there?"

Mr. Kilpatrick: "Yes." [96]

Mr. Simpson: "Then, is it your testimony that Hutchison said he was going to the lavatory to get a drink?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "How long after you came back down there was it that he told you he was going to get a drink?"

Mr. Kilpatrick: "Well, let's see. We come down there, I'd say—I'd say at 10:30, after coffee time, and I'd say, oh—well, 10:00—I mean, 11:00 o'clock."

Mr. Simpson: "About 11:00 o'clock?"

Mr. Kilpatrick: "Yes, something like that."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "And you saw him go through the door in the hold?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "That door leads to this escape hatch?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And that is the last you saw him?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did you notice whether or not he came back down?"

Mr. Kilpatrick: "No, he didn't come back."

Mr. Simpson: "All right. Did you see him at lunch time or supper time?"

Mr. Kilpatrick: "I'm not sure, because, you know, we all wash in there, you know; hungry, and what have you, you know. You sit down and, you know, start to eat." [97]

Mr. Simpson: "What do you call your noon day meal?"

Mr. Kilpatrick: "Lunch, or——"

Mr. Simpson: "Lunch. All right. What time did you come up the hatch, this escape hatch, for lunch?"

Mr. Kilpatrick: "About 11:30 or 25 minutes to 12:00."

Mr. Simpson: "I see. And is it your recollection, Mr. Amundsen, that you did not, at any time after 11:00 o'clock, see Hutchison?"

Mr. Kilpatrick: "Well, I'm not sure if I saw him for lunch. I wouldn't swear to that."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "You wouldn't swear to that?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Could it be possible that you may have seen him for lunch?"

Mr. Kilpatrick: "Yes, sir, yes, sir."

Mr. Simpson: "I see. What time did you turn to again after lunch?"

Mr. Kilpatrick: "1:00 o'clock."

Mr. Simpson: "And did you all go down again?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did Hutchison go down?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Did you ask the boatswain or anyone else——"

Mr. Kilpatrick: "Yes, I said I wondered where Scotty was." [98]

Mr. Simpson: "And did you have a conversation with anyone concerning him?"

Mr. Kilpatrick: "No, no."

Mr. Simpson: "At that time?"

Mr. Kilpatrick: "No."

Mr. Simpson: "All you made was a remark, 'I wonder where Scotty is?' "

Mr. Kilpatrick: "Yes."

Mr. Simpson: "You don't recall any remarks being made by any of the members of the gang down there?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Do you recall, Mr. Amundsen, any remarks being made that Scotty had had a hangover and maybe wasn't feeling well?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "No."

Mr. Simpson: "You don't recall that?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Didn't Scotty tell you, around coffee time, when you were in his quarters there, that he had a hangover, and that he had been out the night before?"

Mr. Kilpatrick: "No. He said he had been out, but he didn't say he was sick."

Mr. Simpson: "No, he didn't say anything about hangover."

Mr. Kilpatrick: Excuse me. That is my answer continued. [99] If I may go back and read it over.

"No. He said he had been out, but he didn't say he was sick.

"No, he didn't say anything about hangover."

Mr. Simpson: "Didn't say anything about a hangover?"

Mr. Kilpatrick: "No."

Mr. Simpson: "You stated that in these particular escape hatches there are sometimes rails, which you have designated as, 'A.A.' in this picture?"

Mr. Kilpatrick: "The same as this; those bars go right across."

Mr. Simpson: "In other words——

"The witness is pointing now to the bars which have been previously drawn in, with the lines leading to the word 'rail.'

"In other words, these lines that you have drawn in indicating bars——"

Mr. Kilpatrick: "Yes."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "——they would bar your entrance to the ladder?"

Mr. Kilpatrick: "That's what I say. We had to climb over on other ships."

Mr. Simpson: "All right. Do you recall, or do you know when Scotty was found?"

Mr. Kilpatrick: "Not exactly." [100]

Mr. Simpson: "How many days after the day you last saw him was it?"

Mr. Kilpatrick: "I think it was four or five days."

Mr. Simpson: "Did you go over to where they found him?"

Mr. Kilpatrick: "I went and took a look, yes."

Mr. Simpson: "And where did you look?"

Mr. Kilpatrick: "Down here, where they found him."

Mr. Simpson: "Down here, and you are referring to the ventilator shaft?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "You are not referring to the——"

Mr. Kilpatrick: "No."

Mr. Simpson: "——escape hatch?"

Mr. Kilpatrick: "No."

Mr. Simpson: "Or the hatch—or the opening where the ladder is?"

Mr. Kilpatrick: "No, no."

Mr. Simpson: "He was down at the bottom of the ventilator shaft?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Now, that ventilator shaft there,

(Deposition of Andreas Amundsen.)

that brings up the air, or allows cold air to get down in the hold, is that right?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And there is a ventilator up on top of [101] the mast house, isn't there?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "But he was not—there was no ladder down in the ventilator shaft, was there?"

Mr. Kilpatrick: "No, but—I mean, there wasn't in this one."

Mr. Simpson: "There wasn't in this particular one, aboard the Linfield Victory?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "That's what I am referring to. Now, you have never seen any cover or opening—a cover over the opening of the ventilator shaft, have you?"

Mr. Kilpatrick: "Not on that ship, no."

Mr. Simpson: "Have you ever been on vessels, Mr. Amundsen, where there is a lack or absence of these particular rails guarding the ventilator shaft?"

Mr. Kilpatrick: "No, no, that's what I'm saying. On all the ships I have been on they have bars across there. (Indicating.)"

Mr. Simpson: "I am not asking you about bars across the ladder shaft; I am asking you about bars across the ventilator shaft. Have you ever been on any vessels where they don't have these?"

Mr. Kilpatrick: "(Indicating.)"

Mr. Simpson: "(Indicating.)" [102]

Mr. Kilpatrick: "No, no."

(Deposition of Andreas Amundsen.)

Mr. Simpson: "There are always bars guarding the ventilator shaft?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Just like they are in this particular picture here, Exhibit B?" Plaintiff's 2.

Mr. Kilpatrick: "Yes."

Mr. Simpson: "And are they all about the same height, that is, the stanchion?"

Mr. Kilpatrick: "Yes, yes."

Mr. Simpson: "Do you know what is at the bottom of the ventilator shaft? Do you know what is at the bottom of the ventilator shaft?"

Mr. Kilpatrick: "Yes, there is a screen."

Mr. Simpson: "A screen, and that allows the air to come up or go down?"

Mr. Kilpatrick: "In the hold, yes."

Mr. Simpson: "You say that Scotty had some money with him when you were talking to him in his quarters there just after coffee time?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did you ascertain or find out whether he had that money on him after his body was found?"

Mr. Kilpatrick: "No. He asked me if I was going to go ashore——" [103]

Mr. Simpson: "After his body was found some four or five days later——"

Mr. Kilpatrick: "Yes, I told the mate and the boatswain."

Mr. Simpson: "Did they find the money on him?"

(Deposition of Andreas Amundsen.)

Mr. Kilpatrick: "Yes."

Mr. Simpson: That concludes the testimony in deposition form of Mr. Amundsen.

Mr. Kilpatrick: May we have just a moment, your Honor?

The Court: Yes.

Mr. Simpson: Your Honor, before proceeding to the next deposition which is that of Ernest Kalnin, might I ask the court, having instructed the jury previously to disregard the markings on the photograph which was offered as Plaintiff's Exhibit 2, before any testimony regarding those markings was introduced, that they might now consider the markings on that particular photograph along with the photograph, which are in evidence, for their enlightenment.

The Court: The markings being those referred to in the testimony?

Mr. Simpson: Yes, your Honor.

The Court: All right. The markings are now in evidence.

Mr. Simpson: The next witness for the plaintiff is Ernest Kalnin, whose testimony will also have to be presented by way of deposition.

Mr. Kilpatrick: Is there any reason why we can't follow [104] the same procedure?

Mr. Gallagher: No.

The Court: I hope the jury is clear about it, that at first we admitted that photograph without any markings. Then, as the witness testified con-

cerning the markings, a motion was made to have the markings made part of the evidence, so they might be considered.

You will consider them as markings that were made by the witness who testified, and whose testimony was read here by the attorney who is standing in for him, as the witness was absent and we were using the deposition. [105]

* * * * *

Mr. Gallagher: Your Honor please, Mr. Simpson and I have agreed for clarification of this photograph that the lines which the witness put on this photograph, to indicate the presence of bars on some other vessels that he had worked on, or some other vessel, are these lines from the stanchion over to the bulkhead, identified as AA, and the one directly below it also going to the bulkhead, and identified with the letters AA, and that the other lines are merely to indicate the rails that he was talking about that were surrounding the ventilator shaft.

Is that correct?

Mr. Simpson: That is correct.

The Court: And respecting what exhibit are you talking about? [106]

Mr. Gallagher: That is Plaintiff's Exhibit 2.

Mr. Kilpatrick: I wonder if I might ask the court whether any member of the jury is in doubt as to any portion of the deposition that was read with reference to the two pictures of the doorway.

A Juror: What I would like to know is where is the door?

Mr. Gallagher: There is another photograph, and you will see that.

The Court: The doorways are not depicted on this picture then?

Mr. Gallagher: May we have that photogargh to put in now, the one that shows the picture taken from the outside of the masthouse, looking in? That shows the door.

The Court: Yes.

A Juror: Are the hatch and the ventilator shaft always together like that?

The Court: That I cannot answer. The attorneys should develop that. Of course, they have to go at it by one witness at a time, and it is rather difficult when the witnesses are questioned at some remote place, usually by corresponding attorneys.

But I think they will get all of that detail of construction before you in the course of the trial.

Mr. Gallagher: There is Plaintiff's Exhibit 3, and I [107] think if we had the other one, which was taken closer to the door showing the inside—that is this one (indicating).

This one shows the door (indicating). This is Plaintiff's Exhibit 3.

(The photograph referred to was marked Plaintiff's Exhibit 3 for identification.)

Mr. Simpson: In the interest of conserving time, we might take all of the photographs which will be introduced from Kalnin's deposition and offer them now, if counsel will stipulate, and put them on the board, so they can be examined.

Mr. Gallagher: That is all right.

A Juror: According to those pictures, where is the door?

Mr. Gallagher: I was just going to say, I think Mr. Simpson will agree with me, that Plaintiff's Exhibit Number 3, which is now being examined, will show you where the door is to the masthouse with reference to both Plaintiff's Exhibit Number 1 and Plaintiff's Exhibit Number 2, and we will have other photographs here showing more views, so that there will be no question about it.

The Juror: Thank you.

Mr. Simpson: Your Honor, Mr. Gallagher has offered to stipulate these pictures might be offered into evidence at this time, the first one to be indicated as Plaintiff's next in order, which would be Plaintiff's 4, and that they shall follow in sequence as they appear. [108]

The Court: All right.

Mr. Gallagher: May we also stipulate all of these pictures were taken at the same time that Plaintiff's Exhibit Number 1 was taken up in Portland, Oregon?

Mr. Simpson: So stipulated.

The Court: They are admitted into evidence.

(The photographs referred to were marked Plaintiff's Exhibits 3 to 11, inclusive, and received in evidence.)

Mr. Gallagher: And they are all photographs of the Linfield Victory.

Mr. Simpson: Of the Linfield Victory.

Mr. Kilpatrick: Does that clear up in everyone's

mind the relationship between the shafts and the doors?

A Juror: The second door——

Mr. Kilpatrick: We will have another picture that will show that.

Mr. Gallagher: Only one door that goes into that. Plaintiff's Exhibit 3 shows the door into the masthouse, through which the men went in order to go to work, by going down the escape hatch; the shaft with a ladder, that is correct.

Mr. Kilpatrick: That is correct.

The Court: Will you please all bear in mind it is very difficult for a reporter, who has her back to you, to get what you are saying unless you speak out in a good clear voice. [109]

Mr. Gallagher: Have I corrected mine, your Honor?

The Court: I think you have.

Mr. Gallagher: All right.

The Court: The reporter, at least, is not indicating need of any fidelity at the moment.

Mr. Simpson: For the record, I am placing these in order, having already put up Plaintiff's 1, 2 and 3.

This is Plaintiff's 4 (indicating). Plaintiff's 5.

Mr. Gallagher: Mr. Simpson, can we stipulate, in view of the fact there may not be enough of the structure shown on Plaintiff's Exhibit 5, to show what it is, that is, the door to the port side of masthouse number two, when the door is closed.

Mr. Simpson: So stipulated.

Mr. Gallagher: In other words, it is the same

door that shows in Plaintiff's Exhibit 3, at which time it is open.

Mr. Simpson: So stipulated. The Plaintiff's 4 is the gear locker referred to in the Amundsen deposition, located on the starboard side.

Mr. Gallagher: It is a locker. I will stipulate with you that material—whatever is shown in there—and other things that may have been described in the deposition were customarily stored in that locker. Is that satisfactory?

Mr. Simpson: That is satisfactory. Plaintiff's 6 is the overhead screen referred to in the Amundsen deposition. [110]

Mr. Gallagher: Isn't that in Kalnin's?

Mr. Simpson: Amundsen.

Mr. Gallagher: Kalnin. In other words, when Mr. Kalnin's deposition is read he will refer to an overhead screen.

I think you refer to it as a fire screen.

Mr. Kilpatrick: May we stipulate, counsel, what this is, is up at the roof of this—

Mr. Gallagher: That is right. It is the roof of the part of the masthouse where this ventilator shaft and this escape shaft are shown in Plaintiff's Exhibit Number 1.

Mr. Simpson: Next, Plaintiff's 7, which is a picture of the main deck of the Linfield Victory, looking forward, showing the masthouse, which has been referred to thus far in testimony, and showing the doors regarding concerning that particular masthouse as closed.

Mr. Gallagher: May we also stipulate this photo-

graph shows hatch number three completely covered and hatch number two completely covered, and that this particular device here that looks like an old fashioned brass horn, a big one, is the ventilator up on top of the masthouse, that Mr. Amundsen referred to.

In other words, it is a ventilator cowl.

Mr. Simpson: On both the port and starboard side.

Mr. Gallagher: Yes. Is that stipulated?

Mr. Simpson: So stipulated. [111]

The Court: Maybe you can agree on a definition of port and starboard for the jury, who, I think, are entirely land people.

Mr. Gallagher: I think they know that, but if there is any doubt, port is to the left and starboard is to the right as you stand on a vessel and look from aft toward the forward part of it.

Mr. Simpson: So stipulated.

Mr. Gallagher: So stipulated.

Mr. Simpson: Next is Plaintiff's Number 8, which is exactly the same as Plaintiff's Number 7, excepting that it shows the doors to the masthouse open.

Mr. Gallagher: And may we stipulate, in view of these photographs, Mr. Simpson, that there are only three doors in the number two masthouse, one on the starboard side and two on the port side?

Mr. Simpson: So stipulated.

Mr. Gallagher: The reason I asked you that is that Mr. Amundsen said, "I think there were four doors."

Mr. Simpson: Plaintiff's Number 9 shows the escape hatch referred to in the Amundsen deposition, going down to the hold, where the men had been working and the ladder he testified they had used.

Mr. Gallagher: May it be stipulated that escape shaft is the same one in which Mr. George Wise is standing on part of [112] that escape hatch ladder in Plaintiff's Exhibit Number 1?

Mr. Simpson: So stipulated. Plaintiff's Number 10 is the ventilator shaft which has been testified to in the Amundsen deposition, looking down to the screen where Amundsen testified that the body of Nathanael Patrick Hutchison was found. So stipulated?

Mr. Gallagher: So stipulated.

Mr. Simpson: And Plaintiff's 11 is a picture showing the entire Linfield Victory.

Mr. Gallagher: As much of it as you can get in a side view.

Mr. Simpson: So stipulated.

Mr. Gallagher: Yes.

* * * * *

Mr. Simpson: Your Honor, may the record show we are commencing to read this deposition of Ernest Kalnin, on page 2, at line 6. [113]

DEPOSITION OF ERNEST KALNIN

Deposition of Ernest Kalnin, taken before Roy Chapin, a Notary Public in and for the County of Los Angeles, State of California, commencing at 2:00 o'clock, Saturday, May 17, 1952, in Suite 720

(Deposition of Ernest Kalnin.)

Rowan Building, Los Angeles, California, pursuant to annexed stipulation.

* * * * *

“Would you state your full name, Mr. Kalnin?”

Mr. Kilpatrick: “Ernest Kalnin.”

Mr. Simpson: “Where do you live, Mr. Kalnin?”

Mr. Kilpatrick: “4720 West 153rd Place.”

Mr. Simpson: “What city is that?”

Mr. Kilpatrick: “That is Lawndale, I guess.”

Mr. Simpson: “That is correct. What is your occupation?”

Mr. Kilpatrick: “I sail as a seaman, watchman, boatswain.”

Mr. Gallagher: Not watchman. That should be winchman, shouldn't it, Mr. Simpson?

Mr. Simpson: I believe that is correct.

Mr. Gallagher: Shall we stipulate to change that word “watchman” to “winchman”?

Mr. Simpson: To “winchman”.

Mr. Gallagher: The answer then reads, “I sail as seaman, winchman, boatswain.”

Mr. Simpson: “For how long have you been in this occupation?”

Mr. Kilpatrick: “Oh, roughly, 20 years.”

Mr. Simpson: “What kind of ships have you been on during this time?”

Mr. Kilpatrick: “Well, practically every type made, passenger ships down to schooners.”

Mr. Simpson: “Have you had occasion to [114] be on a Victory ship?”

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Yes. I was on several Victory ships."

Mr. Simpson: "Do you recall the names of those Victory ships?"

Mr. Kilpatrick: "One was the Linfield Victory, and Hannibal Victory—Oh, right offhand I couldn't give you a list of all, they change so often."

Mr. Simpson: "Directing your attention to the day of April 24, 1951, do you recall what ship you were on at that time?"

Mr. Kilpatrick: "I was on the Linfield at that time."

Mr. Simpson: "What was your capacity on that ship?"

Mr. Kilpatrick: "I was sailing boatswain."

Mr. Simpson: "Did you at that time know the deceased in this particular case, Nathanael Patrick Hutchison?"

Mr. Kilpatrick: "Yes. He shipped in New York as a.b., maintenance."

Mr. Gallagher: Pardon me. Technically, may we stipulate that the letters "a.b." mean able bodied seaman?

Mr. Simpson: So stipulated.

"Do you recall the particular day I have referred to, and any of the events of that day?"

Mr. Kilpatrick: "That day I believe we were in Baltimore, cleaning holds."

Mr. Simpson: "Now, do you recall any [115] particular holds that you might have been in?"

Mr. Kilpatrick: "Number three hold."

(Deposition of Ernest Kalnin.)

Mr. Simpson: "When you were cleaning—could you be more specific?"

Mr. Kilpatrick: "Help pick up the dirt and sweep up the hatch or the cargo, new cargo."

Mr. Simpson: "Would you tell us whom you referred to when you used the word 'we'?"

Mr. Kilpatrick: "There is no such thing as one man going down a hold."

"There was Hutchison and four other sailors and myself down in that hold."

Mr. Simpson: "What did you do with reference to this group?"

Mr. Kilpatrick: "I told them what to do and laid out the work."

* * * * * [116]

Mr. Gallagher: Will your Honor do this: It may be I would want to call Mr. Wise as a witness. He is in the courtroom, so I therefore would ask your Honor to instruct him to either remain or be available. I don't want him to stay here, if he has work to do in his office, but if he will come on telephone call, that is sufficient for my purposes.

The Court: You intend to use him during the presentation of the defense?

Mr. Gallagher: I may. [128]

* * * * *

GEORGE E. WISE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: George E. Wise.

Direct Examination

Q. (By Mr. Simpson): Mr. Wise, are you an attorney at law? A. Yes, I am.

Q. Where are your offices located?

A. In the Ocean Center Building in Long Beach.

Q. Are you one of the attorneys of record in the case at bar? A. Yes, that is correct.

Q. Directing your attention to the day of May 10, 1951, did you have occasion to arrange for the taking of some pictures with respect to the ship SS Linfield Victory?

A. I believe it was in the year 1952, rather than 1951. [130] Sometime in May of that year.

Q. And would you state the circumstances under which those arrangements were made?

A. I believe it was arranged with Mr. Gallagher's office that I might go aboard the Linfield Victory in Portland. The ship at that time was out of commission, as I recollect, or, at least, not being used, and it was docked up in Portland.

And I made arrangements to go up there and had Mr. Gallagher pave the way for my getting

(Testimony of George E. Wise.)

aboard the ship. He made arrangements to have a ship surveyor himself there, and we had a ship surveyor and a photographer, and all of us went aboard at the same time.

Q. I will ask you to step down now, if you would, and look at the Plaintiff's Exhibits appearing on the board here, and direct your attention in particular to Plaintiff's Exhibit Number 1, and ask you if you recognize that picture.

A. Yes, I do.

Q. Is that a picture of you? A. Yes.

Q. And do you recognize the other exhibits, Plaintiff's 1 through 11, as pictures arranged for by you? A. Yes, that is correct.

Q. And who was present when those pictures were taken?

A. A surveyor whom we had there by the name of Mr. Haines, and another surveyor that was there on behalf of the [131] defendants, and the photographer whose name—it was a firm, of Ackroyd, or something like that.

Q. Mr. Ackroyd?

A. And then there was a caretaker aboard the ship, a man, so there would be the two surveyors and the photographer and myself.

Q. Can you tell me how Mr. Ackroyd took these pictures, with what equipment?

A. He had a camera. I don't know anything about cameras. He had a camera and he had a light, bright light, and his own equipment, carried his own equipment.

(Testimony of George E. Wise.)

Q. Now, were you present when all these pictures were taken?

A. Yes, except I recall looking at these—I wasn't present when the two were taken from the inside of the masthouse. I asked Mr. Ackroyd to take a picture of the ceiling and a picture of the door from the inside, and we all came out.

Q. Directing your attention to Plaintiff's Number 3, which shows the door open, will you tell me how that picture was taken?

A. Well, Mr. Ackroyd had his floodlight run on a ladder, which was inside of the masthouse, and he took it from the outside standing—I believe there is—that would be—he was standing on something; I remember he had some difficulty [132] getting up on something. He took it slanting down from outside, and this one——

Q. And again directing your attention to Plaintiff's 1, which is this particular picture, I ask you what, if any, light was used by the photographer for the purpose of taking that picture.

A. That would be the same floodlight.

Mr. Simpson: No further questions. You may cross examine.

Cross Examination

Q. (By Mr. Gallagher): Mr. Wise, at the time Plaintiff's Exhibit Number 3 was taken, where were you?

A. Plaintiff's 11 you are indicating.

Q. Plaintiff's 3.

(Testimony of George E. Wise.)

A. This says "Plaintiff's 11" up here (indicating).

Q. Disregarding that, it has been marked Plaintiff's 3. Where were you?

A. I was standing outside of the door with the other gentlemen. We were all out here in this deck portion (indicating).

Q. Now, you say that there was a floodlight inside at that time? A. Yes, sir.

Q. Did you stand outside of that door, Mr. Wise, [133] before any floodlight was in there and before any artificial illumination was in there and look inside the masthouse? A. Yes, I am sure I did.

Q. This was in broad daylight, wasn't it, Mr. Wise? A. Yes, that is correct.

Q. When the door was open, as it shows in Plaintiff's Exhibit Number 3, and you were standing outside, how close to the door were you?

A. Well, I can't tell you in terms of feet, Mr. Gallagher. We came up—we knew which masthouse we were going to look in——

Q. I am not interested in that.

A. I am just trying——

Q. Can you tell us how close you got to the masthouse door without any light, any artificial light inside at all?

A. Well, I may have been the one who opened the door, if I had gotten that close, or, at least, I would have been with the other gentlemen.

Q. Did you see the door opened? A. Yes.

Q. You watched it being opened?

(Testimony of George E. Wise.)

A. Yes, I either opened it myself or one of the other gentlemen did.

Q. When you opened the door, did you look inside the masthouse? [134] A. Yes.

Q. And when you looked inside, what did you see? A. Well,—

Q. Just point out on either Plaintiff's Exhibit 2 or Plaintiff's Exhibit 3 what was visible to you with the light that came through that door open in broad daylight, without any other kind of light inside that masthouse whatsoever.

A. I think it would be like looking into a closet with the door open. You could make out the fact there were things in there, probably make out the rough outline of things, these things.

It would be looking from the outside light into a dark area. You see the—

Q. Mr. Wise, is it your testimony, as a fact in this case, that with the masthouse door open and standing outside on the deck in broad daylight, that you could not see clearly these pipe railings and the fact that there were two openings in the deck and the fact that there was a ladder going down the escape hatch?

A. I could see there were these things in there, Mr. Gallagher, but whether—

Q. That isn't the question.

A. Not clearly, not like you can see it here with the—as I say, it is like looking from the outside into a closet. You will see what is in there gen-

(Testimony of George E. Wise.)

erally, but you won't see it [135] clearly, as if you have a light on it.

Q. It is your testimony, Mr. Wise, that a door which is not inside of a room, now, and you are not going into a closet, you are going from broad daylight through a door which has the natural diffusion of light, you recognize that, don't you?

A. Yes.

Q. Is it your testimony under oath, Mr. Wise, that standing out here you were unable to see clearly these pipe railings, the stanchion and the fact there was a ladder in that escape hatch?

Will you please answer that yes or no?

A. I can't answer it yes or no, because I don't know what you mean by the word "clearly". If it is as clear as this, no (indicating).

I think I have said you can see—I could see these items in here, but not clearly (indicating).

Q. Well, were you able to see that there were pipe railings around an opening in the deck, to wit, this ventilator shaft?

A. Yes, I think you could see the pipe railings.

Q. You did see the pipe railings before you went in there, didn't you?

A. I think I did but I am not sure just whether I did or not. I think I did, Mr. Gallagher. [136]

Q. Your best recollection——

A. My best recollection would be that, as I say, not clearly as you would see them here, but you could see them; could make them out.

Q. Well, there was no difficulty about your eye

(Testimony of George E. Wise.)

sight telling you, before you walked in, and without any light, just from the light that came from broad daylight through this wide open door, that there were pipe railings around the ventilator shaft, isn't that correct?

A. No. I could see those.

Q. When you say "no" you mean it is correct, don't you?

A. Well, what was your question again?

Mr. Gallagher: Will you read it to him, please?

(The question was read.)

The Witness: I think I would say I had no difficulty in making out that there were railings there, yes.

Q. (By Mr. Gallagher): And standing outside and before you walked in the masthouse at all, without any artificial illumination inside, you were able to see there were two shafts inside of that masthouse, weren't you?

A. I would say no. If I were looking in there I could see that there was something on the deck. But—I mean if there were shafts or what they were, and so far as the ladder, I don't recall seeing those from the outside. I remember we looked specifically for those when we got in. [137]

Q. I am not asking you what you specifically remember. I am asking you, Mr. Wise, if you testify, as a fact, here under oath before this jury, that standing outside the masthouse, close up to the door, with the door wide open, you could not

(Testimony of George E. Wise.)

see that there were two shafts in that masthouse, two openings in the deck?

A. Well, I don't remember looking specifically to see whether there were two openings or a ladder, or anything like that. I don't have any recollection of seeing them prior to the time we started looking for them when we went inside.

Q. That isn't the question I asked you.

A. My testimony is I don't recall looking specifically, so I obviously can't remember, because—I mean I just don't remember seeing them.

Q. Mr. Wise, you studied physics in high school, didn't you? A. Yes.

Q. You learned about the diffusion of light, didn't you? A. Yes, I think so.

Q. And when you walk up to a house——

Mr. Simpson: Your Honor, I feel I must object to this interrogation regarding physics and diffusion of light as being quite irrelevant to any of the direct testimony given by Mr. Wise, and it is improper cross-examination. [138]

The Court: Overruled.

Mr. Gallagher: Will you read that last question to Mr. Wise?

(The record was read.)

The Witness: I say I probably studied about diffusion of light, but so far as having any knowledge about the physics of it, I am sure I don't.

Q. (By Mr. Gallagher): Mr. Wise, when you stood outside of the masthouse on the deck here (in-

(Testimony of George E. Wise.)

sight telling you, before you walked in, and without any light, just from the light that came from broad daylight through this wide open door, that there were pipe railings around the ventilator shaft, isn't that correct?

A. No. I could see those.

Q. When you say "no" you mean it is correct, don't you?

A. Well, what was your question again?

Mr. Gallagher: Will you read it to him, please?

(The question was read.)

The Witness: I think I would say I had no difficulty in making out that there were railings there, yes.

Q. (By Mr. Gallagher): And standing outside and before you walked in the masthouse at all, without any artificial illumination inside, you were able to see there were two shafts inside of that masthouse, weren't you?

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(Testimony of George E. Wise.)

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Mr. Gallagher: Will you read that last question to Mr. Wise?

(The record was read.)

The Witness: I say I probably studied about diffusion of light, but so far as having any knowledge about the physics of it, I am sure I don't.

Q. (By Mr. Gallagher): Mr. Wise, when you stood outside of the masthouse on the deck here (in-

(Testimony of George E. Wise.)

dicating), there was nothing to prevent whatever light could get through that door in broad daylight, preventing whatever light there was to get into the masthouse, is that right? A. That is right.

Q. So whatever amount of natural light in broad daylight would go through this masthouse door, when it was opened, was inside the mast house when you stood out there and looked in, isn't that true?

A. Yes.

Q. Now, I want to ask you again: Is it your positive testimony that there was not enough light in broad daylight, going through that doorway, wide open, to enable you to see two openings in the deck of that masthouse?

Please answer that yes or no.

A. No.

Q. You could not see it? [139]

A. That is not what I said. I say it is not my positive testimony. In other words, what I said was I don't recollect looking at these shafts.

I recollect opening a door—or being there when the door was opened, and observing generally pipe railings in there. Not clearly, like here, but you could make them out.

I don't have any recollection of seeing the shafts before we actually looked for them.

Q. Did you look at the floor of the masthouse before you walked in, for the purpose of ascertaining whether there was enough light in broad daylight, with that door open, to enable a person with

(Testimony of George E. Wise.)

normal eye sight to see and recognize openings in the deck of that masthouse?

A. I think I checked around—probably not then—the part you are talking about, but later I was looking generally for any lights or any lighting conditions, generally, yes.

Q. I am just not talking about artificial illumination, Mr. Wise. Let's stick to the question.

A. The question?

Q. Eliminating everything excepting the natural lights, which was present there all around that masthouse on the day you were there in broad daylight, with the door of that masthouse open, standing there at the door, could you, with your degree of visibility, see with just that light openings [140] in the deck of the masthouse? Yes or no.

A. We later——

Q. Just answer it yes or no.

The Court: You may answer yes or no, but then you are entitled to explain.

The Witness: Could I have the question?

(The question was read.)

The Witness: I think my answer would be yes, Mr. Gallagher.

* * * * *

Q. (By Mr. Gallagher): Mr. Wise, how far was it from the coaming here, that is, the doorway into the masthouse, to the stanchion which was at the corner of the guard rails around the ventilator shafts? Was it about three feet, or three and a half feet?

(Testimony of George E. Wise.)

A. I think that—I think that three feet would be about right, Mr. Gallagher. We have the figures on it, and I think your man has, also, which would show that.

Mr. Gallagher: Perhaps there is an exhibit here which would show that.

Mr. Simpson: With Mr. Gallagher's consent on those figures, your Honor, we do have a drawing which was introduced, marked, rather, that we would like to offer at this time, which might help on that. [143]

Mr. Gallagher: Which is the doorway? Here is the doorway opening (indicating).

The Witness: Thirty inches from here to here (indicating).

Mr. Gallagher: A few inches——

Mr. Simpson: Do you want to stipulate to that?

Mr. Gallagher: Yes.

Mr. Simpson: May that be offered, then, as Plaintiff's 12, your Honor.

The Court: There is no foundation for it, but if Mr. Gallagher stipulates we will receive it.

If not, you will have permission to present a foundation.

Mr. Gallagher: Yes, that is all right, your Honor. That may be received as Plaintiff's 12, with the stipulation that those are the measurements taken by your surveyor, Mr. Haines, at Portland, at the same time that Mr. Wise was there. Is that correct?

The Court: Admitted.

(Testimony of George E. Wise.)

(The document referred to was marked Plaintiff's Exhibit 12 and received in evidence.)

Mr. Simpson: I don't know that Mr. Haines was there at that time for the drawing.

Was he?

The Witness: Yes. It was either Mr. Haines or your surveyor, I don't know which. [144]

Q. (By Mr. Gallagher): It says "Haines" down here, Walter O. Haines. A. Yes.

Q. According to this diagram, which is in evidence, the distance from the door to the pipe railings—here it is—the distance from the door is approximately thirty inches, plus three or four more on each end, or about thirty-six inches. Isn't that right? A. That is correct, yes.

Q. So that a person standing here, right up against the opening of the door, and who was going to lift his foot over that door sill or door coaming, to go in, would be looking, not over forty inches inside, to the point where the stanchion at the corner of the pipe rails was located, isn't that correct?

A. That is right.

Q. Before you went in you could see these pipe rails and that stanchion was there?

A. Yes, generally what you see here, but not as clearly.

Q. Not as clearly as this?

A. Yes, that is right.

Q. But you could see generally everything that shows in that photograph?

(Testimony of George E. Wise.)

A. I doubt that you could see a ladder here (indicating), for example. [145]

Q. Do you remember that you were not able to see the ladder, Mr. Wise, and is it your testimony under oath that standing outside you could not see the ladder?

A. All I can say in that is that I don't recall seeing the ladder when I looked in.

Q. Is it your testimony that there wasn't sufficient visibility to enable you to see the ladder, the top of the ladder, at least, if you looked at it?

Mr. Kilpatrick: We will object to that question. The witness has answered the question at least a dozen times. He does not recall seeing these when he looked in.

The Court: Sustained.

Q. (By Mr. Gallagher): You are not testifying that you looked in the direction of the ladder and failed to see it, are you, Mr. Wise?

Mr. Kilpatrick: Objection to the question again, your Honor. That question or questions similar to it have been asked and answered.

The Court: This is cross examination. I think in the present form it is a proper question.

Mr. Gallagher: May he have it read, so he will have it in mind?

(The question was read.)

The Witness: No. If I can explain, I am not testifying that I saw it by that answer—I mean I just don't recollect [146] seeing it when I looked in,

(Testimony of George E. Wise.)

but I could see there was nothing on the floor and see the pipe railings.

Q. (By Mr. Gallagher): You don't recollect having looked at that specific location before you walked in the masthouse, isn't that true?

A. I just don't recall.

Q. You just don't remember one way or the other, is that a fair statement?

A. That is a fair statement.

Q. Mr. Wise, did you go inside of that masthouse at any time when the door was closed and locked?

A. I went in and closed it myself. I don't know whether I locked it, but I think you have to pull down——

Q. The dogs.

A. To dog it down. Not all of them, just the one handle, closing it up.

Q. So that the door can be locked and unlocked both from the outside and the inside?

A. Now, that I don't know.

Q. You locked it from the inside?

A. I don't know whether I locked it. I closed it, whether it was locked I am not sure.

I think that this dog comes over here and holds it closed, just the one will hold it (indicating).

Q. You think it does. Are you testifying under oath [147] that that dog falls over by itself?

A. No, I am sure I did it.

Q. Very well. Now, Mr. Wise, on the day when you were up there and these pictures were taken,

(Testimony of George E. Wise.)

the hatch was completely covered and closed over, wasn't it? A. Yes.

Q. Now, in Plaintiff's Exhibit Number 1 you are part way down the ladder, aren't you?

A. Yes.

Q. How did you get in the position in which you are shown in Plaintiff's Exhibit Number 1? What did you hold onto before you took your first step on the ladder, if you held onto anything?

A. Let's see, I know I never came up from below. I went down from this way (indicating). And how I got there I don't know, frankly.

Q. Well, you know that the only way you got on the ladder was from the masthouse deck, don't you? A. Yes, that is right.

Q. The masthouse deck is this area shown at the bottom of Plaintiff's Exhibit Number 1, isn't it?

A. Yes.

Q. So you walked in through the door shown in Plaintiff's Exhibit Number 3 and stepped on the masthouse deck, didn't you? [148]

A. Yes, I am sure I did. I have no specific recollection but I would gather I did.

Q. And the shaft with the ladder in it was immediately to your left as you stepped through the door and stood upon the deck of the masthouse, wasn't it? A. Yes.

Q. So that you didn't have to walk, or you didn't walk over here by the ventilator shaft in order to get into the ladder shaft, did you?

A. Whether that picture was taken before the

(Testimony of George E. Wise.)

others—we were in there for quite awhile. Whether I came from some other part I don't know.

I wouldn't have—in other words, I just walked in. I wouldn't have had to go to this side to get to this side (indicating).

Q. It was your intention before you stepped into the masthouse, at least on one occasion, to get onto the ladder in the escape shaft and go down it, wasn't it? A. Yes.

Q. And when you stepped into the masthouse for that purpose, all you had to do was to step across the coaming and walk through the door, take hold of the stanchion at the corner of the pipe railings or take hold of the top pipe railing, and then reach down with your foot and put it on the top rung of the ladder, isn't that correct? [149]

A. That is one way of doing it.

Q. Is that the way you did it, or did you do it some other way?

In other words, did you climb over this pipe railing which surrounded the ventilator shaft and then climb over the second set of rails, in order to get onto the ladder in the escape shaft, or did you just walk in there and put your hand on this pipe railing and put your foot down on the top rail of the ladder, as your first step?

A. I don't recall, but if you would want me to guess what I might have done——

The Court: No, don't guess.

Q. (By Mr. Gallagher): No.

(Testimony of George E. Wise.)

The Court: If you don't recall, you can't answer the question.

Q. (By Mr. Gallagher): Well, did you hold onto anything with your hands before you got into the position shown in Plaintiff's Exhibit Number 1? If so, what?

A. I don't recall, but I would think——

The Court: Now, no. We don't want you to speculate.

Q. (By Mr. Gallagher): What is your best recollection?

A. I am a lawyer; I know I shouldn't think.

The Court: If you can recall do so. If you can't, say so.

The Witness: I don't recall specifically, Mr. Gallagher. [150]

Q. (By Mr. Gallagher): Well, is it your best recollection that you got into this position where you are shown in Plaintiff's Exhibit 1 without your hands touching anything in that masthouse, until you reached a point where your hands are grasping the top rung of the ladder in the escape shaft?

A. No, I would have remembered definitely if I had gotten there under those circumstances.

Q. The only thing for you to hold onto would be the stanchion or these pipe railings?

A. Or this portion over there, that extends out here (indicating). One way or the other I would assume I would have grabbed to that, or that (indicating).

Q. This portion of what you say is the deck,

(Testimony of George E. Wise.)

that is the upper part of the steel bulk work which separates the two shafts, isn't it?

A. That is correct.

Q. In order to take hold of that, it would be at your foot level if you were standing on the deck, wouldn't it? A. Yes.

Q. So in order to get hold of that, before you touched the rung of the ladder, you would have to do a good bend over with your toes reaching—with your fingers reaching at least down to your toes, wouldn't you?

A. Not dissimilar to the way I have gone down many ladders in the navy. I mean—that is perfectly possible. [151]

Q. You don't recall stepping onto the top rung of the ladder without taking hold of anything else that was available there as a handhold, do you?

A. No. I might even have held onto the—something along the side here (indicating).

Q. Over here (indicating)?

A. That, or any of these things (indicating). I don't have any specific recollection.

Q. Isn't it your recollection, your best recollection, Mr. Wise, that you did take hold of something with your hand to steady yourself before you reached the position you are in in Plaintiff's Exhibit 1? A. Yes.

Q. Now, did you go all the way down the ladder? A. No.

Q. How far did you go?

A. Just as I am shown there (indicating).

(Testimony of George E. Wise.)

Q. Then did you climb up? A. Yes.

Q. And what did you hold onto in getting up to the deck level?

A. I don't recall specifically, but again I would assume either——

Q. I am not asking you to assume.

A. I don't have any specific recollection. [152]

Q. Now, where did you get—withdraw that.

Were you present when this drop light was procured, the drop light that shows down here (indicating)?

I don't remember what number that was. Is that 10? In Plaintiff's Number 10, were you present when that drop light was procured?

A. Yes, I was.

Q. Where did you get it?

The Court: He didn't testify he got it.

Mr. Gallagher: That is right, your Honor. I am sorry I tried to put that in his mouth.

The Witness: I didn't get it.

Q. (By Mr. Gallagher): You didn't bring the light in with you——

A. I am trying to recollect whether the photographer brought it or whether it was a light—whether he merely brought the floodlight.

He came with a box of equipment and camera equipment. And I recall, if you want me to explain this,——

Q. I just want you to answer that question, if you can. You didn't bring any floodlight on board, did you? A. No.

(Testimony of George E. Wise.)

Q. You didn't bring this floodlight that shows on the locker on the starboard side of the mast-house with you on board, did you?

A. No. [153]

Q. And the photographer didn't bring that, either, did he?

A. This one (indicating)?

Q. Yes. That one that shows in Plaintiff's—

A. No.

Q. —Exhibit 4.

A. No, I don't know whether that is a floodlight or what it is. It is something—

Q. It looks like a reflector of some kind, doesn't it? A. Yes.

Q. That was there when the locker was opened up for you on your visit to the vessel?

A. Yes.

Q. Did you see an electric plug outlet here on the after bulkhead of masthouse number two in this place where I am pointing on Plaintiff's Exhibit 7. (indicating)?

See this device right here (indicating)?

A. I don't recall.

A Juror: May I ask, what is meant by mast-house number two?

Mr. Gallagher: Masthouse number two is this structure between hatch number two and hatch number three. That is, all of these pictures—

The Juror: All the pictures—

Mr. Gallagher: All the closeups are pictures of [154] masthouse number two.

(Testimony of George E. Wise.)

The Juror: Masthouses, plural?

Mr. Gallagher: No, masthouse; only one masthouse number two.

The Court: You agree with that, counsel?

Mr. Simpson: Yes, your Honor.

Mr. Gallagher: I think that is all, your Honor.

The Court: Redirect examination of Mr. Wise?

Mr. Simpson: No redirect, your Honor.

Mr. Simpson: No direct, your Honor. * * * * *

Thursday, Oct. 6, 1955. 9:30 A.M.

Mr. Gallagher: Your Honor, we have a stipulation which will answer a question asked by one of the jurors.

The access doorway to the masthouse we have been talking about is 54 inches high and 21 inches wide.

Mr. Simpson: So stipulated.

Mr. Kilpatrick: You were on page 4, line 22 of the Kalnin deposition.

Mr. Simpson: That is correct.

Mr. Kilpatrick: I might suggest we back up——

Mr. Gallagher: To line 20, page 3.

Mr. Kilpatrick: ——to line 20, page 3, and bring the jury in on the last question again.

Mr. Simpson: “Would you tell us whom you referred to when you used the word ‘we’?”

Mr. Kilpatrick: “There is no such thing as one man going down a hold. There was Hutchison and four other sailors and myself down in that hold.”

Mr. Simpson: “What did you do with reference to this group?”

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "I told them what to do and laid out the work." [159]

Mr. Simpson: "Can you be specific as to the time of the day?"

Mr. Kilpatrick: "That was about eight o'clock in the morning and we turned to in No. 3 hatch. The first thing we did there was open one section, aft section of No. 3 hatch. There's a ladder there and there's also a ladder in midship house. You can use either way to go down that hold."

Mr. Simpson: "Now, what happened after you gave these orders, that you observed?"

Mr. Kilpatrick: "Well, I already told you, went down by the hatch and went to work."

Mr. Simpson: "For how long did you work?"

Mr. Kilpatrick: "Until ten o'clock."

Mr. Simpson: "Then what did you do?"

Mr. Kilpatrick: "Then we stopped and went for coffee."

Mr. Simpson: "Then what did you do?"

Mr. Kilpatrick: "At 10:15 we went back in to clean up again, finish the job."

Mr. Simpson: "How long did you work?"

Mr. Kilpatrick: "Worked until dinner."

Mr. Simpson: "How long was that?"

Mr. Kilpatrick: "Knocked off about ten to twelve. Always give time to clean up."

Mr. Simpson: "For how long did you observe Mr. [160] Hutchison working in this hold?"

Mr. Kilpatrick: "He worked until dinner time."

(Deposition of Ernest Kalnin.)

Mr. Simpson: "Did you observe Hutchison leave the hold?"

Mr. Kilpatrick: "He left to come up dinner time. He left about ten minutes to twelve, the same as the rest of the gang."

Mr. Simpson: "Was there any occasion thereafter when you observed Mr. Hutchison?"

Mr. Kilpatrick: "Well, I seen him once more after that, coming from the mess room."

Mr. Simpson: "Did you observe anything in particular about him?"

Mr. Kilpatrick: "No."

Mr. Simpson: "When was the next time that you observed Mr. Hutchison?"

Mr. Kilpatrick: "That was about—in Philadelphia, I believe."

Mr. Simpson: "About Philadelphia?"

Mr. Kilpatrick: "In Philadelphia."

Mr. Simpson: "When was that?"

Mr. Kilpatrick: "That was when we found him then."

Mr. Simpson: "What date was it, approximately what time?"

Mr. Kilpatrick: "Before arrival in Philly on April [161] 30th, about six days later."

Mr. Simpson: "Where did you observe Mr. Hutchison?"

Mr. Kilpatrick: "It was No. 3 masthead."

Mr. Simpson: "What did you observe about Mr. Hutchison at the time?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Which way do you mean that? At the time I found him?"

Mr. Simpson: "What did you see?"

Mr. Kilpatrick: "He looked at me like he was dead.

Mr. Simpson: "I am not interested in what he appeared there to you. What did you actually see?"

Mr. Kilpatrick: "Down there?"

Mr. Simpson: "That's right."

Mr. Kilpatrick: "He was down there — looked like the man was asleep, but when I seen who it was, I knew the guy was dead right there."

Mr. Simpson: "What did you do then?"

Mr. Kilpatrick: "Got the mate and called for an ambulance and they took over from there on. They wouldn't let us touch him or anything."

Mr. Simpson: "Was this the first occasion when Hutchison had been missed?"

Mr. Kilpatrick: "Oh, he was missed, but I figured he went ashore, as guys do when they want a day off or so, they just go ashore." [162]

Mr. Simpson: "Did you or any other person observed by you make a search?"

Mr. Kilpatrick: "No, we—the only place we searched for him was in the forecastle and the mess room; and when we didn't find him in there, we just told the mate to order another sailor, and we did, thinking he was left behind."

Mr. Simpson: "How long had you been on the Linfield Victory?"

Mr. Kilpatrick: "I think I was on there about

(Deposition of Ernest Kalnin.)

four and a half months, four months anyway.”

Mr. Simpson: “Mr. Kalnin, I am showing you here certain photographs which I would like you to identify if you can. This particular photograph, have you ever seen that before?”

Mr. Kilpatrick: Counsel, do you know what that photograph is?

Mr. Simpson: That is marked as “Roy Chapin No. 1”. It would be one of the exhibits.

Mr. Gallagher: It is this one (indicating).

The Court: Those are photographs on the board.

Mr. Simpson: Photographs already admitted in evidence.

The Court: I think, being as small as they are, they ought to be placed about midway of the jury box so all the jurors can see them. [163]

Mr. Gallagher: Mr. Simpson, the photograph that the witness is referring to is this one here, isn't it (indicating)?

Mr. Simpson: That is correct, Plaintiff's 11.

Mr. Gallagher: Here in evidence.

Mr. Simpson: Marked “Roy Chapin No. 1”.

Mr. Kilpatrick: “This particular ship looks like Linfield Victory but I don't see no name on it. It could be Linfield Victory. You see the name is all knocked out. You really can't tell one ship from another—Victories, they all look alike.”

Mr. Simpson: “These I would like you to mark in the order that I give them to you, Mr. Chapin.

“(Photograph marked ‘No. 1, Roy Chapin, N.P., May 17, 1952’)”

(Deposition of Ernest Kalnin.)

"Here I show you another photograph of the same ship, looking forward, and ask you to identify what you see here, if you will."

Mr. Kilpatrick: May we interrupt to identify that? It is marked "No. 2, Roy Chapin, N.P., May 17, 1952".

Mr. Gallagher: It is No. 7, Plaintiff's Exhibit No. 7 in evidence here.

Mr. Simpson: So stipulated.

Mr. Kilpatrick: Suppose we read the next portion from here. [164]

Mr. Gallagher: That is all right, if his Honor has no objection. May we stand here?

The Court: Certainly.

Mr. Gallagher: Thank you.

Mr. Kilpatrick: "Well, that is No. 3 hatch——"

Mr. Gallagher: He didn't ask the question yet.

Mr. Kilpatrick: I believe he did.

Mr. Gallagher: Yes, that is right.

Mr. Kilpatrick: "Well, that is No. 3 hatch, and this is the locker which leads down into the hold on the port side, that is, on the left-hand side going up."

Mr. Simpson: "Now, let me ask you to identify that again. You stated this was the locker?"

Mr. Kilpatrick: "The stairway."

Mr. Gallagher: Then I said this statement:

"He said 'This is the No. 3 hatch and this is the locker.' I didn't see any hatch there."

Mr. Simpson: "You do in this picture."

(Deposition of Ernest Kalnin.)

Mr. Gallagher: Then I answered Mr. Simpson's statement:

"That's the one that looks straight through the center of the ship. I see. I am sorry. That's right. I am no sailor, you see, and I wasn't paying any attention."

Mr. Kilpatrick: The witness said:

"You will be before you leave." [165]

Then the answer:

"This is the same picture, only with the mast-house doors open."

He is there referring to "No. 3, Roy Chapin, May 17, 1952".

Mr. Gallagher: That is No. 8 in evidence here; correct?

Mr. Simpson: Correct.

Mr. Gallagher: This is 1 here.

Mr. Simpson: "Have you ever seen that?"

Mr. Kilpatrick: "This is the entrance to the ventilator shaft, here where the railing is; and you can easily see the stairway leading down to the hatches, down to No. 3 hatches."

Mr. Gallagher: Then I interjected this question: "What did he say, that was the ladder?"

Mr. Kilpatrick: The witness said:

"Ladder or stairway; call it anything you want."

Mr. Gallagher: Mr. Simpson said, "He is ashore now."

Mr. Simpson: "I show you another one here and ask you to tell us what you see there."

Mr. Kilpatrick: "Well, as I say, ventilator, and

(Deposition of Ernest Kalnin.)

same thing leading down, the ladder leading down into the hatch."

Mr. Simpson: "It is the ladder on the left and ventilator on the right?" [166]

Mr. Kilpatrick: "That's right."

The witness was identifying photograph marked No. 4, Roy Chapin, May 17, 1952".

Mr. Gallagher: It is Plaintiff's No. 2 in evidence here. Correct?

Mr. Simpson: Correct.

"Tell us what you see here, in this photograph."

Mr. Kilpatrick: "This is the stairway or ladder leading down into the hold on the left again, and just a small part of the ventilator showing."

Excuse me. Withdraw that. The witness there is——

Mr. Simpson: Is pointing——

Mr. Kilpatrick: Which is he pointing to, No. 4 or 5 of Roy Chapin?

Mr. Simpson: No. 5.

Mr. Kilpatrick: That is this one here (indicating)?

Mr. Gallagher: That is correct. That is No. 9 in evidence here, as Plaintiff's exhibit. Is that correct?

Mr. Simpson: Correct.

Mr. Kilpatrick: The witness' answer there was:

"This is the stairway or ladder leading down into the hold on the left again, and just a small part of the ventilator showing."

Mr. Simpson: "What do you observe here?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "This is your ventilator itself [167] with—with a cluster light hanging down in it. I don't suppose you want me to mention a pair of shoes sticking out."

That would be——

Mr. Gallagher: No. 10, Plaintiff's Exhibit No. 10 in evidence here.

Mr. Kilpatrick: It is marked in the deposition as Roy Chapin's No. 6.

Mr. Gallagher: Some man is standing with his feet on the center pipe railing.

Mr. Simpson: "From your observation on this ship, approximately how deep is that?"

Mr. Kilpatrick: "Oh, I'd say twenty feet."

Mr. Simpson: "What do you observe here?"

Mr. Kilpatrick: This is referring to Roy Chapin's No. 7.

Mr. Simpson: That is correct.

Mr. Gallagher: Roy Chapin No. 7 is Plaintiff's Exhibit No. 6 in evidence here.

Mr. Kilpatrick: "That is overhead of the ventilator."

Mr. Simpson: "What is this?"

Mr. Kilpatrick: "Screen fire preventer."

Mr. Gallagher: Then I asked him this question: "What is that you say?"

Mr. Kilpatrick: The witness replied: "Screen."

Mr. Gallagher: "That is part of No. 7, isn't it?"

Mr. Simpson replied, "That is No. 7", referring to the "7" which had been placed on the photo-

(Deposition of Ernest Kalnin.)

graph by the notary public at the time the deposition was deemed taken.

Is that correct, Mr. Simpson?

Mr. Simpson: That is correct. It is agreed by counsel to delete the following portion of the deposition, to page 14, commencing with—

Mr. Gallagher: 13—that is right, page 14.

Mr. Simpson: Commencing with line 7.

“Who was Hutchison’s superior, or who gave him orders?”

Mr. Kilpatrick: “I did.”

Mr. Simpson: “What were his wages?”

Mr. Kilpatrick: “Roughly, he’d make average wages about 270 something a month plus anywhere from \$80 to \$100 a month overtime, which was an average.”

Mr. Simpson: “I don’t think of any other questions at the present moment. Do you have some, Mr. Gallagher?”

Mr. Gallagher: And I replied:

“Yes, I have. Thank you.”

I will read the cross examination, the questions. May I use your copy?

Mr. Simpson: Yes. [169]

* * * * *

Mr. Gallagher: “Are you a member of the local union here?”

Mr. Kilpatrick: “I am a member of the Sailors Union of the Pacific.”

Mr. Gallagher: “What local?”

Mr. Kilpatrick: “Any local. If you belong to one

(Deposition of Ernest Kalnin.)

you belong to all, you know, any place on the coast.”

Mr. Gallagher: “What was your last employer’s name?”

Mr. Kilpatrick: “Olson Steamship.” [171]

* * * * *

Mr. Gallagher: “As I understand your direct examination, you signed on as a member of the crew of the Linfield Victory in New York.”

Mr. Kilpatrick: “No, I signed on in Frisco.”

Mr. Gallagher: “I see. And Mr. Hutchison signed on—at least, he got on the ship in New York?”

Mr. Kilpatrick: “That’s right.”

Mr. Gallagher: “You didn’t see Mr. Hutchison sign any articles, did you?”

Mr. Kilpatrick: “No. I don’t know. That is up to the captain.”

Mr. Gallagher: “You didn’t actually see him sign any articles?”

Mr. Kilpatrick: “No.”

Mr. Gallagher: “The ship went from New York to Baltimore?”

Mr. Kilpatrick: “That’s right, just the regular loop she makes, you know.”

Mr. Gallagher: “How far belong the main deck of the ship which is shown in photograph No. 2—I will withdraw that question. Is this deck alongside the hatch shown [172] in picture No. 2 the main deck?”

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: Do you want to refer to the exhibits in evidence?

Mr. Gallagher: I think perhaps, your Honor please, the jurors having been told what number an exhibit is here, when it is referred to as a Chapin number, No. 2, No. 3, No. 4, so forth, will probably be sufficiently oriented to keep track of it without pointing out each time.

If the jurors want us to do it, we will tell them what the exhibit is here. If they don't want it, let's just go ahead and use the numbers that Chapin put on the pictures.

The Court: The jurors will not be backward in telling counsel when they need to have a particular picture pointed out and identified.

A Juror: I think it ought to be pointed out.

Mr. Gallagher: Chapin No. 2 is No. 7 in evidence here. And each one of these photographs, where we refer to the fact that Chapin put a number on it, it is written right on the face of the photograph by Mr. Chapin.

But we will try to identify each one of them as we go along.

Mr. Kilpatrick: I believe your question started on line 14, at page 16.

Mr. Gallagher: That is right. "How far below the main deck of the ship which is shown in photograph [173] No. 2—I will withdraw that question. Is this deck alongside the hatch shown in picture No. 2 the main deck?"

(Deposition of Ernest Kalnin.)

That No. 2 being Plaintiff's Exhibit No. 7 in evidence here.

Mr. Kilpatrick: "That's the main deck."

Mr. Gallagher: "And the masthouse that you have been referring to is on the right-hand side of the mast—the left-hand side of the mast as you look at the picture?"

Mr. Kilpatrick: "Would be left-hand side, port side of the ship, that is, going from aft going forward would be on the left-hand side."

Mr. Gallagher: "What do you call these things here?"

Mr. Kilpatrick: "Well, masthouse doors."

Mr. Gallagher: "They are watertight doors, aren't they?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "What is this door over here on the right-hand side of the mast?"

Mr. Kilpatrick: "It is a gear locker—keep your extra wires and slings and stuff like that in there."

Mr. Gallagher: "How far below the level of the main deck was this hold that you and the men who were working with you were cleaning out on the morning that you have referred to?" [174]

Mr. Kilpatrick: "It was the shelter deck."

Mr. Gallagher: "Next deck under?"

Mr. Kilpatrick: "First deck down from the main deck, and the next deck below that is called the lower hold."

Mr. Gallagher: "Now, did all of you go down there at about the same time from the main deck?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Roughly, yes. Only takes one man at a time on the ladder."

Mr. Gallagher: "How did all of you go down?"

Mr. Kilpatrick: "Some went down through the masthouse and some went down through the aft part of No. 3."

Mr. Gallagher: "How did you go down?"

Mr. Kilpatrick: "I didn't. I could see everything from the deck. I was standing at the winches."

Mr. Gallagher: "Did you see Mr. Hutchison go down?"

Mr. Kilpatrick: "He went down in the morning, yes."

Mr. Gallagher: "How did he go down?"

Mr. Kilpatrick: He didn't go down this way that time, but he came up that way noon time."

Mr. Gallagher: "When you say he came up that way, you are referring to the ladder in the shaft which is right next to the ventilator shaft?"

Mr. Kilpatrick: "Yes. He came up through this ladder in this masthouse."

Mr. Gallagher: "You are referring to picture No. 4," [175] which is Plaintiff's No. 2 in evidence on this trial, aren't you?"

Mr. Kilpatrick: "I don't know the number of the picture—that's what it is."

Mr. Gallagher: "All right, now can you show me anything in any of these photographs to indicate the route taken by Hutchison in going down to the shelter deck?"

Mr. Kilpatrick: "Going down—I never seen him

(Deposition of Ernest Kalnin.)

go down. He went down through this end of the hatch to work. Coming up, he went this way."

Mr. Gallagher: "Did you see him go down?"

Mr. Kilpatrick: "Yes. I was standing right there."

Mr. Gallagher: "Was the hatch open?"

Mr. Kilpatrick: "One section open, the aft part. Right square middle of the winches is the ladder."

Mr. Gallagher: "On the forward end?"

Mr. Kilpatrick: "Same thing on this end as this end."

Mr. Gallagher: "The ladder going from the main deck down—there is a ladder which goes from the forward hatch coaming on—Is that hatch No. 2 or 3?"

Mr. Kilpatrick: "No. 3."

Mr. Gallagher: "There is a ladder which goes from the forward hatch coaming of Hatch No. 3 down to the level of the shelter deck, and there is also another ladder at the aft coaming of Hatch No. 3 which goes down [176] to the shelter deck?"

Mr. Kilpatrick: "That's right, two."

Mr. Gallagher: "Both of these ladders are vertical ladders, aren't they?"

Mr. Kilpatrick: "That's right, straight up and down."

Mr. Gallagher: "Somewhat similar to the ladder which is shown on picture No. 5?"

Which is Plaintiff's No. 9 in evidence here?

Mr. Kilpatrick: "It is exactly like that."

Mr. Gallagher: "O. K. So that some of the men

(Deposition of Ernest Kalnin.)

who were working down there with Mr. Hutchison went down the ladder in the shaft adjacent to the ventilator shaft and some of the men went down the ladder which was right at the aft coaming of Hatch No. 3?"

Mr. Kilpatrick: "That's right, you know, either way; both leads to the same place."

Mr. Gallagher: "And when Mr. Hutchison came up, you were still on deck?"

Mr. Kilpatrick: "I was still on deck until they all came up."

Mr. Gallagher: My inquiry, your Honor, standing here so close to the jurors and talking as loud as I am, that I am disturbing them.

A Juror: May I ask a question at this point? I am not quite clear where the other ladder is at. Will that be brought [177] out later?

Mr. Kilpatrick: Could we stipulate on it?

Mr. Gallagher: We will have to explain it. Let's talk it over so I don't say anything I shouldn't say in front of the jury.

I think we will explain that. If you will look at Plaintiff's Exhibits 7 and 8, you see, this black covering material, and that is the tarpaulin which is stretched over the top of the hatch coverings (indicating).

When that is removed, this tarpaulin, and the hatch covers themselves, then there is an opening in the deck as wide as this picture shows the hatch coaming to be, and as long as this picture shows the hatch to be.

(Deposition of Ernest Kalnin.)

go down. He went down through this end of the hatch to work. Coming up, he went this way."

Mr. Gallagher: "Did you see him go down?"

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(Deposition of Ernest Kalnin.)

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When that is removed, this tarpaulin, and the hatch covers themselves, then there is an opening in the deck as wide as this picture shows the hatch coaming to be, and as long as this picture shows the hatch to be.

(Deposition of Ernest Kalnin.)

Now, on the forward end of the hatch there is a coaming, like this rail here (indicating), and in the center of the width of that forward end there is a ladder which is straight down, up and down, and the upper end of the ladder is bolted or welded to the inside of the hatch coaming below the upper portion.

There is exactly the same kind of a vertical steel ladder attached to the inside of the aft part of the hatch coaming, and those are the ladders that Mr. Kalnin was referring to as being in Hatch No. 3.

Is that right?

Mr. Simpson: That is correct. [178]

Mr. Gallagher: Is that satisfactory?

The Juror: In other words, there is a ladder here and this picture shown there, there is a ladder goes down there and one goes down there (indicating)?

Mr. Gallagher: That is right.

Mr. Kilpatrick: And a third ladder——

Mr. Gallagher: The third ladder is inside the masthouse.

Mr. Kilpatrick: The third ladder is inside the masthouse.

Mr. Gallagher: They all lead to the same place.

Mr. Kilpatrick: We agreed to stipulate these ladders were between winches.

Mr. Gallagher: I thought we covered that by saying they are in the center of the width of the hatch coaming. We have stipulated that these devices here, which you see on Plaintiff's Exhibits 7 and

(Deposition of Ernest Kalnin.)

8, are the winches, and there is a set of winches at the forward end of Hatch No. 3 and a similar set of winches at the after end, so that the ladders are right here in the space between the winches.

That is right there in the center of the hatch coaming, is that clear?

The Juror: That is clear. The one on that end is referred to in this picture No. 2?

Mr. Gallagher: No.

Mr. Kilpatrick: No.

Mr. Gallagher: The one referred to up here is not in [179] the hatch at all (indicating). That is inside this masthouse, which is shown.

The Juror: Yes. Oh, yes. I am sorry.

Mr. Gallagher: There are three ladders that have been referred to.

The Juror: I have it now.

Mr. Kilpatrick: This masthouse is this masthouse (indicating).

The Juror: I have got it now.

Mr. Gallagher: May we stipulate when Mr. Kalnin referred to the aft end of Hatch No. 3 being uncovered, he was referring to the after portion of it, or the part toward the rear end of the ship.

Mr. Kilpatrick: Yes, his testimony was in response to your question, that the hatch—the answer was “One section open, the aft part. Right square middle of the winches is the ladder.”

The Court: Now, you have apparently finished the explanation that a juror inquired about. Is it

(Deposition of Ernest Kalnin.)

satisfactory to all counsel or does it need any clarification, amendment or correction?

Mr. Simpson: Quite satisfactory, if satisfactory to the jury.

Mr. Gallagher: It is satisfactory to me.

Mr. Kilpatrick: Are you on page 19, line 2?

Mr. Gallagher: That is right.

“O. K. So that some of the men who were working down there with Mr. Hutchison went down the ladder in the shaft adjacent to the ventilator shaft and some of the men went down the ladder which was right at the aft coaming of Hatch No. 3?”

Mr. Kilpatrick: “That’s right, you know, either way; both leads to the same place.”

Mr. Gallagher: “And when Mr. Hutchison came up, you were still on deck?”

Mr. Kilpatrick: “I was still on deck until they all came up.”

Mr. Gallagher: “And you observed Mr. Hutchison coming up the ladder which is in the shaft adjacent to the ventilator shaft?”

Mr. Kilpatrick: “He came up and came out through the masthouse and walked between the winches and one side to the mess hall.”

Mr. Gallagher: “That is a little too complicated for me. I’d like to keep this thing simple. Did you see Mr. Hutchison come up the ladder which was in the shaft adjacent to the ventilator shaft?”

Mr. Kilpatrick: “I tried to explain: I seen him come out of the masthouse. I wasn’t watching him coming up the ladder.” [181]

(Deposition of Ernest Kalnin.)

Mr. Gallagher: "You didn't see him come up the ladder?"

Mr. Kilpatrick: "He had to, in order to come out of the masthouse."

Mr. Gallagher: All you saw was that Mr. Hutchison came out of this masthouse door?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "The only way he could have gotten up from the shelter deck to the main deck was to come up this ladder in the shaft adjacent to the ventilator shaft?"

Mr. Kilpatrick: "Yes, that's the only way he could come up that way unless he could come up on the other end, which he didn't."

Mr. Gallagher: "He couldn't have come up any ladder except the one that is shown in this picture, marked No. 4," which is Plaintiff's Exhibit No. 2 in evidence here, "to come out of the masthouse door, could he?"

Mr. Kilpatrick: "No. He had to come up that ladder."

Mr. Gallagher: "Then, when he came up—or when you saw him walk out of the masthouse door, you say he walked aft then?"

Mr. Kilpatrick: "He went towards the mess hall."

Mr. Gallagher: "Along the starboard side of the ship?"

Mr. Kilpatrick: "That's right." [182]

Mr. Gallagher: "Did you see him in the mess hall?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "No. I seen him on the companionway, coming from the mess hall. Evidently he got there before I did."

Mr. Gallagher: "Then you didn't see him go into the mess hall at all?"

Mr. Kilpatrick: "No. I saw him come out of the mess hall. That's the only place he could have been."

Mr. Gallagher: "Did you see where he went after that?"

Mr. Kilpatrick: "No, I didn't see where he went after that."

Mr. Gallagher: "Did the other men who had been working down at the level of the shelter deck of hatch No. 3 go back to that part of the ship and continue working after lunch?"

Mr. Kilpatrick: "One o'clock, yes."

Mr. Gallagher: "How long did they work?"

Mr. Kilpatrick: "We worked until three that day, finished the job."

Mr. Gallagher: "Was Mr. Hutchison down there at any time between one and three?"

Mr. Kilpatrick: "No." [183]

Mr. Gallagher: "Now, when Mr. Hutchison didn't show up at one o'clock, you took it for granted that he had gone ashore, didn't you?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "And that was the reason you didn't conduct any search for him?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "As a matter of fact, you had

(Deposition of Ernest Kalnin.)

the mate call the police department to see if he might possibly be in jail, didn't you?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "And when you found out he wasn't in jail you sent for another sailor to take his place?"

Mr. Kilpatrick: "That's right."

Mr. Gallagher: "Do you recall giving testimony at a merchant marine investigating unit of the United States Coast Guard at Philadelphia, Pennsylvania, on May 1, 1951?"

Mr. Kilpatrick: "Yes, that's where we went then."

Mr. Gallagher: "At that time were you asked the following questions and did you give these answers:"

Questions by Mr. Bikle:

"Q. You saw him at lunch?"

"A. I seen him at dinner time but I didn't stay long, coming out the mess room just had a [184] bowl of soup, started out of the mess room. I didn't see him any more after that."

Questions by the Investigating Officer:

"Q. The last place you saw him was in the mess room?"

"A. That was the last place, yes.

"Q. What was his condition regarding sobriety?"

"A. Was he sober?"

"Q. Yes.

"A. Oh, yes, he was sober, slight hangover."

Then my questions started again:

(Deposition of Ernest Kalnin.)

"Did you give those answers to those questions?"

Mr. Kilpatrick: "Yes. He was sober that day, I know that."

Mr. Gallagher: "But he did have a hangover?"

Mr. Kilpatrick: "I guess so, from the night before—didn't feel good."

Mr. Gallagher: "Had you seen him the night before?"

Mr. Kilpatrick: "No, but I know he was ashore the night before."

Mr. Gallagher: "So, on the day of the accident when you saw him you came to the conclusion that he had been drinking but that all he had was a hangover?"

Mr. Kilpatrick: "That's all. When I woke him up in the morning he was in the bunk and [185] there was no bottles, and he was just feeling rough, that's all."

Mr. Gallagher: "When you say he was just feeling rough, what do you mean by that?"

Mr. Kilpatrick: "You know, when a guy stays up late—it is his duty to go to work and he knew it and had to turn to."

Mr. Gallagher: "I know what a hangover is. What did you mean when you said he had a hangover?"

Mr. Kilpatrick: "Well, just feeling rough."

Mr. Gallagher: "Hangover from what?"

Mr. Kilpatrick: "I don't know."

Mr. Gallagher: "Would you say hangover with respect to drinking?"

(Deposition of Ernest Kalnin.)

Mr. Kilpatrick: "Could have been out late, going around somewhere, too, you know."

Mr. Gallagher: "Well, tell me what you meant when you used the word hangover before the Coast Guard investigation?"

Mr. Kilpatrick: "Did you ever wake up with a hangover, feeling rough—don't feel good."

Mr. Gallagher: "Was it your testimony at the Coast Guard—or, did you intend to convey to the Coast Guard, when you used the word hangover, that the man merely might have been up late?"

Mr. Kilpatrick: "Well, that usually results [186] from—because you don't get no sleep—don't feel good."

Mr. Gallagher: "Then you didn't mean when you said hangover that he appeared to have been drinking the night before and had a hangover from it?"

Mr. Kilpatrick: "I don't know whether he was drinking or not; I wasn't ashore with him."

Mr. Gallagher: "You still haven't answered my question. When you said he had a hangover, did you use that word to convey the impression that he had been drinking the night before and had some of the results of it the next day?"

Mr. Kilpatrick: "No, I didn't say that at all, didn't mean that at all, that he was drinking. I can't say the man was drinking; I wasn't with him; I don't know what he was doing. I know he had been out late, though."

(Deposition of Ernest Kalnin.)

Mr. Gallagher: "How did you know he had been out late?"

Mr. Kilpatrick: "He mentioned the fact he got in at four in the morning."

Mr. Gallagher: "He told you that himself?"

Mr. Kilpatrick: "He said, 'I hate to work today but I have got to do it.'"

Mr. Gallagher: "How long did you stay aboard the Linfield Victory altogether, Mr. Kalnin?"

Mr. Kilpatrick: "I shipped in Frisco, you know, round trip, plus another half a trip. Now, I don't know just [187] how long it takes. I don't pay any attention to time."

Mr. Gallagher: "How often did the members of the crew, to your knowledge, use the ladder which was in the shaft immediately adjacent to the mast-house ventilator shaft for the purpose of going to some deck below the level of the main deck and for the purpose of going to some deck below the level of the main deck and for the purpose of coming up to the main deck from a level below the main deck?"

Mr. Kilpatrick: "That ladder is put there for the use—for that purpose—when people are working on the winches, they don't want them to interfere with the winch drivers and get in the way and get hit."

Mr. Gallagher: "So they are used constantly?"

Mr. Kilpatrick: "All the time, yes."

Mr. Gallagher: "Day and night?"

Mr. Kilpatrick: "Whenever they are working."

(Deposition of Ernest Kalnin.)

Mr. Gallagher: "They work at night as well as daytime at times?"

Mr. Kilpatrick: "Sometimes."

Mr. Gallagher: "When they are unloading cargo or unloading?"

Mr. Kilpatrick: "We don't load cargo—sailors don't. Longshoremen use it all the time." [188]

Mr. Gallagher: "Was the hatch uncovered at the aft end of hatch No. 3 all during the day that you have been talking about?"

Mr. Kilpatrick: "Yes—heaving dirt slings out, you know, sweepings from the hold."

Mr. Gallagher: May I confer with Mr. Simpson a moment?

The Court: Yes.

Mr. Gallagher: We can stipulate at this point, your Honor, that when the witness refers to dirt slings he means a cloth or wire device in which the debris is placed, after being swept up in the hold, and then it is hooked together in some fashion and is hoisted out of the hatch by means of the winch.

Then they will send the empty sling down the same way, by means of the winch.

Mr. Simpson: So stipulated.

Mr. Gallagher: Thank you.

"So that the ladder at the aft hatch coaming of hatch No. 3 was available all during that day for the purpose of either going from the main deck down to the shelter deck or from the shelter deck up to the main deck?"

Mr. Kilpatrick: "Right. The ladder in that hatch

(Deposition of Ernest Kalnin.)

is one they use at all times when the hatch is [189] open, so you don't get hit with the winches' loads."

Mr. Gallagher: "When you said 'The ladder in that hatch,' you meant the ladder in the mast-house?"

Mr. Kilpatrick: "Yes. Ain't suppose to use the one by the winches."

Mr. Gallagher: "You weren't working cargo that day?"

Mr. Kilpatrick: "No, but we were heaving slings out."

Mr. Gallagher: "I see. Now, the last time you saw Mr. Hutchison, was he in the mess room, as you testified before the Coast Guard, or was he outside?"

Mr. Kilpatrick: "He was coming out from the mess room in a passageway."

Mr. Gallagher: "Was he still under cover?"

Mr. Kilpatrick: "He was inside."

Mr. Gallagher: "Inside the midshiphouse?"

Mr. Kilpatrick: "Right."

Mr. Gallagher: "So you didn't see him at any time out on deck after lunch?"

Mr. Kilpatrick: "No."

Mr. Gallagher: The next subject is one I am leaving out. Page 27.

Mr. Kilpatrick: We resume at page 27 with re-direct examination by Mr. Simpson.

Mr. Gallagher: You still have mine?

Mr. Simpson: I still have yours, Mr. Gallagher.

(Deposition of Ernest Kalnin.)

Mr. Gallagher: All right. I will come up there then.

Mr. Simpson: "Mr. Kalnin, simply by way of clarification of answers to questions by Mr. Gallagher: You testified that because you had told the police, I believe it was, or some one in Baltimore, that this man had probably gone ashore, that there was no reason for a search."

Mr. Gallagher: He didn't adopt it. Just read what the witness says. I think probably we are going to have to read the whole thing. It seems to have been settled that way.

Then I made this remark: "No, he didn't so testify. What he said was that they called the police to find out if he was in jail and that when they were told that he wasn't in jail they just sent for another man."

Mr. Kilpatrick: The witness said, "I will explain that."

Mr. Gallagher: Then I said, "He said the reason he didn't make a search was that he figured that the man had just gone ashore."

Mr. Kilpatrick: Then the witness said, "Which happens when you are alongside a dock."

Mr. Simpson: "Well, where such a conclusion as the one you have testified to is not reached, do you conduct a search on a ship?"

Mr. Kilpatrick: "Yes, looked in the mess room and in his room and he wasn't there, and called the hospital [191] and police stations and he wasn't there, so we ordered another sailor, that's all."

(Deposition of Ernest Kalnin.)

Mr. Simpson: "Mr. Gallagher has further asked you about the use of the word hangover. When Hutchison was awakened in the morning, what did you observe specifically? I know this is what Mr. Gallagher is interested in. What did you observe specifically in Mr. Hutchison's conduct?"

Mr. Kilpatrick: "Well, he wanted to sleep in. If I didn't give him a good shake he probably would sleep in—wouldn't turn to."

Mr. Simpson: "Did you observe anything in his conduct that would lead you to believe that he had been drinking?"

Mr. Kilpatrick: "No."

Mr. Simpson: "You have testified with respect to the ladder located in the masthouse, going from the main deck of the shelter deck, that was adjacent to the ventilator shaft. That was used frequently?"

Mr. Kilpatrick: "That's right."

Mr. Simpson: "To your knowledge, did Mr. Hutchison use it frequently?"

Mr. Kilpatrick: "No, I saw him come down and go to dinner."

Mr. Simpson: "That was the only time that [192] you had ever seen him use the ladder?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: "With respect——"

Mr. Kilpatrick: Now, I think we stipulated to strike those questions, Mr. Simpson.

Mr. Gallagher: The rest of it is on the excluded subject.

Mr. Simpson: That concludes the Kalnin deposition then, your Honor.

* * * * *

Mr. Simpson: For the record, this is the reading of the deposition of Kent Stephen Castle, Jr., taken September 20, 1952, and commencing on page 6 at line 20 thereof:—

Mr. Gallagher: Can we stipulate this witness is Mrs. Hutchison's son-in-law?

Mr. Simpson: Yes.

"Will you state your occupation or profession."

Mr. Kilpatrick: "Merchant marine officer."

Mr. Simpson: "Are you presently aboard a ship?" [193]

Mr. Kilpatrick: "Yes."

Mr. Simpson: "What ship is that?"

Mr. Kilpatrick: "Joel Chandler Harris, coast-wise line."

Mr. Simpson: "What in general are your duties aboard the ship?"

Mr. Kilpatrick: "Stand bridge watch and supervise loading and discharge of cargo and general operation of the vessel when on watch."

Mr. Simpson: "Do you have a rating at the present time?"

Mr. Kilpatrick: "I am at present third mate aboard this vessel. I have been master with the same company up until a short while ago."

Mr. Simpson: "You were master of a ship?"

Mr. Kilpatrick: "All last winter back East, yes, until they laid about twenty of them up and they bounced us all back a little."

(Deposition of Kent Stephen Castle, Jr.)

Mr. Simpson: "How long have you been an officer in the merchant marine?"

Mr. Kilpatrick: "Received my first license in 1940, March of 1940."

Mr. Simpson: "Do you hold a master's license at the present time?"

Mr. Kilpatrick: "Unlimited master's license in steam, any tonnage, any ocean, for nine years [194] now, second issue."

Mr. Simpson: "Have you been an officer and actively practicing as an officer aboard ship since 1940?"

Mr. Kilpatrick: "Yes, except for some small intervals in between. I mean it is not exactly steady. I was for many years with Matson Navigation Company, but in the last four years prior to this I was in business for myself up north, in Humboldt Bay, and went back to sea about a year ago—or two years ago, it would be. I was tow-boating up there."

Mr. Simpson: "How long have you been connected with the merchant marine in some form?"

Mr. Kilpatrick: "More or less continuously since July of 1931, as seaman or officer."

Mr. Simpson: "When you were a master aboard ship, what type of ship was that master of?"

Mr. Kilpatrick: "Liberty ships, both during the war and lately."

Mr. Simpson: "When was the most recent time you were a master of a ship?"

Mr. Kilpatrick: "I came back from the East

(Deposition of Kent Stephen Castle, Jr.)
the middle of May of this year. That would be around May—first part of May. I don't know exactly."

Mr. Simpson: "In the period that you have been employed in the merchant marine, have you [195] had occasion to become familiar with a large number of ships and serve aboard a large number of ships?"

Mr. Kilpatrick: "I have served aboard nearly every type of vessel in the American Merchant Marine except the vessel in question in this case."

Mr. Simpson: "That is, Victory ship?"

Mr. Kilpatrick: "Victory, so-called Victory ship."

Mr. Simpson: "Have you ever been aboard a Victory ship?"

Mr. Kilpatrick: "Yes, I have. I was aboard the Linfield Victory in San Francisco."

Mr. Simpson: "Is that the only Victory ship you have been aboard?"

Mr. Kilpatrick: "I have been aboard casually to visit friends on one or two others before, just to come aboard and say hello."

Mr. Simpson: "In tonnage and size of ship, is the Liberty ship comparable to the Victory ship?"

Mr. Kilpatrick: "Very similar."

"That would be a matter of record, the tonnages are recorded. They are similar in tonnage, yes; the horsepower is different and the general layout of the vessel is a little different; but the actual gross tonnage is very close."

(Deposition of Kent Stephen Castle, Jr.)

Mr. Simpson: "In connection with your work as master and officer of a ship have you had occasion to become [196] familiar with devices installed aboard ships?"

Mr. Kilpatrick: "Yes, I have become familiar with shipboard practices, ever since the time I started going to sea—practices, how to work; and P.M.A. inspectors come around and give bulletins every month to its ships' officers, especially the chief mates."

Mr. Simpson: "I believe the question was merely whether you had, and your answer would be yes?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: Now, turn to page 14, line 4.

"Are you familiar with the Victory Ship Linfield Victory?"

Mr. Kilpatrick: "Familiar in the respect that I went aboard her."

Mr. Simpson: "Will you answer that yes or no."

Mr. Kilpatrick: "Yes."

Mr. Simpson: "Did you have occasion to go aboard the Linfield Victory sometime in the past year or two?"

Mr. Kilpatrick: "I went aboard the Linfield Victory, as near as I can recall, in May of—latter part of May, it would be of 1951, in San Francisco."

We now turn to page 15, line 6. [197]

"Did you talk to anyone aboard ship at that time?"

Mr. Kilpatrick: "I introduced myself to the

(Deposition of Kent Stephen Castle, Jr.)

chief officer who was on duty and he showed me the space involved."

Mr. Simpson: Now, just a moment, I want to take this one step at a time. Do you recall the name of the chief officer?"

Mr. Kilpatrick: "Offhand, I can't. I met him only the one time and I can't—it was a rather short name, as I remember."

Mr. Simpson: "Was he aboard the ship at the time or did you meet him out on the deck?"

Mr. Kilpatrick: "He was aboard the vessel. I went aboard and introduced myself to him. He was the same mate that was on there when the accident occurred, I know."

Mr. Simpson: "Did he state that to you?"

Mr. Kilpatrick: "Yes."

Mr. Simpson: We next turn to page 18, line 18.

"Did you examine the masthouse with the hatch door closed?"

Mr. Kilpatrick: Counsel, will you check page 16, line 14?

Mr. Gallagher: That is right. This part is [198] out, and this part is in. (Indicating.)

Mr. Simpson: I am sorry.

Mr. Kilpatrick: Is that the line, line 14?

Mr. Simpson: Yes, line 14.

"When you went out on deck, what did you do, after you went out on deck together?"

Mr. Kilpatrick: "We went to the—I believe they call it the No. 2 raised deck house, on deck. He showed me this ladder and trunk on the port side,

(Deposition of Kent Stephen Castle, Jr.)
and explained how the body was found, how it lay—the position in which it lay.”

Mr. Simpson: “Did you make an examination yourself of the masthouse and the area surrounding it?”

Mr. Kilpatrick: “Yes. I went up and down the ladder several times and looked down the trunk and looked about the interior of the masthouse or blower house, whatever they call it, on there.”

Mr. Simpson: Now we turn to page 18, line 18.
“Did you examine the masthouse with the hatch door closed?”

Mr. Kilpatrick: “The mate and I closed the hatch door to see just how dark it was in there. It was quite dark, and this was in late forenoon.”

Mr. Simpson: Next turn to page 19, line 17.

“Did you note any screen or other——” [199]

Mr. Gallagher: That word, I think, is——

Mr. Kilpatrick: We agreed that could stay in.

Mr. Gallagher: We didn’t agree to it. Maybe the judge ruled it could be.

The Court: I think I ruled it could stay in. It is descriptive. Of course, it is an opinion, to an extent, but it would be for the jury to decide what weight to give it.

Mr. Kilpatrick: Will you repeat the question, please?

Mr. Simpson: “Did you note any screen or other protective covering surrounding the ventilating shaft?”

Mr. Kilpatrick: “There was no screen over the

(Deposition of Kent Stephen Castle, Jr.)
ventilating shaft at all. It was open on the top.
There was a broken screen on the bottom, the hold
end of it, the lower end." [200]

* * * * *

"Q. (By Mr. Wise): I am taking this one step
at a time. Do you have an opinion as to whether
this area constituted a safe place to work?

"A. I have an opinion, yes.

"Q. (By Mr. Wise): What is that opinion?

"A. My opinion is that with proper illumination
or with the doors wide open so that daylight
could get in, it would be safe enough to work in the
area mentioned, in the area of the masthouse."

* * * * *

LORKAN FELIM CRAWFORD

called as a witness by the plaintiff, being first
sworn, was examined and testified as follows: [201]

The Clerk: Please be seated.

Your full name, sir.

The Witness: Lorkan Felim Crawford.

Direct Examination

Q. (By Mr. Simpson): Captain Crawford, I
am going to ask you to be sure and keep your voice
up so everyone in the courtroom can hear you, and
I will ask the jurors if any of you cannot, please
indicate that.

Captain Crawford, where do you live?

A. In Long Beach.

Q. Would you give me your address in Long
Beach?

(Testimony of Lorkan Felim Crawford.)

A. 1825 East First Street.

Q. How long have you lived there?

A. Three years.

Q. And where did you live before that?

A. 4245 East Third Street, Long Beach.

Q. Now, what is your vocation, Captain?

A. I am president of Crawford Nautical Schools and Crawford Nautical Advisers, and principal of Crawford Nautical Schools.

Q. Where are those schools located?

A. 802 South Palos Verdes and 129 West Eighth Street, San Pedro.

Q. Captain Crawford, did you go to college? Do you [202] have a degree regarding nautical schools?

A. I have no college degree.

Q. How far in your formal education did you progress? A. Well, high school.

Q. And thereafter you undertook this vocation referred to? A. Thereafter I went to sea.

Q. And in what capacity?

A. I started in as a deck cadet,—

Q. How old were you? A. 14.

The Court: You hadn't finished. You started in as a deck cadet, and you started to say something and counsel interrupted. Do you want to say something more?

The Witness: Yes. I started in as a deck cadet in a sailing vessel.

Q. (By Mr. Simpson): And for how long did you remain in that capacity? A. Four years.

Q. And then what did you do?

(Testimony of Lorkan Felim Crawford.)

A. I sailed in various ships, United States vessels, practically all over the world, until I went up through the grades and obtained a license as master of steam or motor vessels any gross tons, waters of any ocean.

Q. When did you obtain such a master's license? [203]

A. I would say about 40 years ago.

Q. Do you still have such a master mariner's license? A. Yes.

Q. Would you, Captain Crawford, tell me the experience and training that you have had with respect to your general vocational background?

A. I have sailed as a ship's officer. I was a pilot in San Francisco Bay and port captain for Richfield Oil Corporation; subsequently transferred to Long Beach, California, as port captain.

Q. For how long were you in the capacity of port captain at Long Beach?

A. I believe about four years, until the last war started, and I went back to sea as master of a ship.

Q. Now, in your school, the Crawford Nautical Schools, do you teach in that school?

A. Yes; I am the principal.

Q. What do you teach?

A. I teach navigation, marine engineering, naval architecture and rules and regulations of the Coast Guard, which include safety and stowage of cargo, seamanship, nautical astronomy, meteorology and general—

Q. Captain Crawford, you mentioned that you

(Testimony of Lorkan Felim Crawford.)

have sailed on many kinds of ships. Can you tell us what kinds of ships you have sailed on? [204]

A. Do you mean types?

Q. Types, yes, please.

A. Steam vessels, motor vessels and sailing vessels.

Q. And have you ever had any experience with Victory ships? A. Professionally?

Q. Yes. A. No.

Q. Have you ever been aboard Victory ships?

A. Yes.

Q. Are you at all familiar with the construction and design of Victory ships? A. Yes.

Q. Now, in the course of your experience aboard ships, Captain Crawford, have you ever had occasion to observe or do you know if there was a custom with regard to accounting for men?

A. Yes. [205]

* * * * *

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Gallagher: If your Honor please, we didn't discuss this question of an alleged custom of conducting searches for crew members who might not show up for work while we were in chambers.

But I would ask your Honor to make the same order, with respect to this subject matter, as you did with reference to the comparison testimony, which had to do with the ladders and screens and so forth and so on.

(Testimony of Lorkan Felim Crawford.)

And that your Honor make an order that my objecting upon each ground which I referred to in chambers shall be deemed to physically appear in the record immediately following each question along this line of alleged question of searching for missing crew members, and immediately following each answer the record shall be deemed to physically show a motion to strike on the same grounds set forth in the objection. [206]

And I particularly call your Honor's attention to this proposition: When anybody is asked, "Is there a custom," he obviously forms his own conclusion with reference to whether there is a custom.

We think the evidence is entirely irrelevant and not within the issues pleaded. It is my understanding that when any custom is relied upon it must be pleaded. They don't claim this was a custom of the defendant.

The Court: The record will show that the objections are made as to each question upon this subject, and overruled, and a motion to strike made and denied, unless there be some actual presentation and ruling here to the contrary.

Mr. Gallagher: Is your Honor going to restrict this witness, in any event, to what he claims he observed before April 24, 1951, and is your Honor going to restrict him from using words like "safety precautions" and all that sort of thing?

You remember last time we tried this case he did use those expressions, which are purely conclusions.

The Court: I think that it is proper for him to

(Testimony of Lorkan Felim Crawford.)

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(Testimony of Lorkan Felim Crawford.)

do so, if the questions are put to him. We can't require witnesses to not use words which are common nomenclature within the industry or field within which they are testifying.

The jury will be instructed, of course, insofar as conclusions are concerned, they are the ones to form conclusions, [207] except that they may accept the opinions of experts if the expert is shown to be an expert and the reasons given for an opinion are such as entitle it to acceptance by the trier of fact.

In short, I will give them the conventional instruction upon the limitations of expert testimony.

Mr. Gallagher: May the record also be deemed to physically include to any question, which asks him about safety precautions or a safety practice or safety measures or like phrases, an additional and specific objection upon the ground that that is incompetent evidence. It is not a subject of expert testimony, and it calls for a conclusion and opinion of the witness.

And that a motion to strike shall be physically deemed to be in the record following each answer that the witness may give on that subject or those subjects.

The Court: That is acceptable to this court.

Mr. Gallagher: And your Honor so makes such an order?

The Court: I do.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)
The Court: Proceed.

(Testimony of Lorkan Felim Crawford.)

Q. (By Mr. Simpson): Captain Crawford, just before recess I asked you a question which, if it will not inconvenience the reporter too much, I would like to have read, and your answer [208] to it read.

(The record was read.)

Q. (By Mr. Simpson): Captain Crawford, was such a custom in effect on April 24, 1951?

A. To the best of my knowledge and belief, yes.

Q. And what was that custom?

A. To account for the working hours and places of each member of the crew at all times.

Q. And from your experience, was there any custom to accounting for men who were missing?

A. Yes.

Q. And on April 24, 1951, was that in existence?

A. To the best of my knowledge and belief, yes.

Q. And what was that custom?

A. The custom was to determine when a man was assigned to any particular work that he performed that work so that an accounting could be kept in a logical way of his man hours.

Q. And if a man were missing, was there any custom for ascertaining his whereabouts?

A. A search of the vessel——

The Court: Well, the question is was there a custom.

The Witness: Yes. Excuse me, your Honor; yes.

Q. (By Mr. Simpson): Was that custom in existence on April 24, 1951?

(Testimony of Lorkan Felim Crawford.)

Q. Captain Crawford, in the course of your experience, you have observed any custom or do you know of any custom with respect to the illumination of areas, work areas aboard a ship, such as a masthouse? A. Yes.

Q. And what is that custom?

Mr. Gallagher: May we have the same objections?

The Court: Yes. It is understood the objection is a running objection to this line of interrogation.

Q. (By Mr. Simpson): What is that custom, Captain Crawford?

A. To thoroughly illuminate any area in which a man or men are working.

Q. Captain Crawford, I would like you, if you would, to step down from the witness stand and to look at Plaintiff's Exhibit 4.

Mr. Simpson: Your Honor, this will only take a second.

The Court: Move it over. Don't be too concerned with time.

Q. (By Mr. Simpson): I am showing you Plaintiff's Exhibit No. 4. I ask you if you can identify that for us.

A. It is a masthouse and it would appear to me that [212] this is a lock of some type (indicating).

Q. And what is this portion I am now pointing to at the upper center of Plaintiff's No. 4?

A. The cowl of the ventilator.

Q. Showing you Plaintiff's No. 7, I ask you how far down does such a ventilator go?

(Testimony of Lorkan Felim Crawford.)

A. The cowl should end at the top of the mast-house. The ventilator shaft continues to the compartments to be ventilated.

Q. Directing your attention again to Plaintiff's 4, with this open hatch door, I ask you, can you see the ventilator shaft? A. Yes.

Q. Where is it? A. There (indicating).

Q. Is that an open ventilator shaft?

A. No.

Q. What do you see?

A. I see a metal division which might be the side of the shaft, looking from here.

Q. Captain Crawford, also directing your attention down here to Plaintiff's No. 2, I ask you, can you identify these particular bars marked on the exhibit as rails? A. Identify them, yes.

Q. And what are they? [213]

A. Guard rails.

Q. In the course of your experience, observing that you have "AA", "AA" here, indicating rails going across, have you ever seen rails projecting in that area? A. No.

Q. Now, asking you another question, in the course of your experience, have you ever seen any other protective devices such as these guard rails around the ventilator shaft? A. Yes.

Q. What have you seen?

A. A screen, a heavy screen which excludes the danger.

Mr. Gallagher: Just a moment. I don't think the witness would be permitted by your Honor to ex-

(Testimony of Lorkan Felim Crawford.)

Q. Now, you say you were master of ocean going vessels during the last war? A. Yes.

Q. Were those also vessels built by the United States of America? [216] A. No.

Q. During the last war? A. No.

Q. Were they vessels which had been built prior to the last war? A. Yes.

Q. Well, you know that there were several types—I will withdraw that.

Captain, you have said that you are familiar with the Coast Guard rules and regulations.

A. Yes.

Q. Is it true that as a part of those regulations there is a yearly inspection of all steam cargo vessels conducted by the Coast Guard? A. Yes.

Q. And is it true that according to those regulations no steam vessel may be navigated or used as a cargo vessel on navigable waters of the United States without a certificate of inspection having been issued by the Coast Guard? A. Yes.

Q. Are those certificates of inspection standard? They are, aren't they, Captain? A. Yes.

Q. When did you start going to sea last, that is, what was the date that you started going to sea after the [217] commencement of the so-called World War II?

A. That I cannot recollect.

Q. Well, you remember that the Japanese bombed Pearl Harbor on December 7, 1941.

A. Yes.

Q. Was it after that that you went to sea?

(Testimony of Lorkan Felim Crawford.)

A. It was after that.

Q. And how long after that?

A. I would say——

Q. A year or——

A. I would say February of '42, or thereabouts.

Q. Now, how long before that had it been that you had last gone to sea on any ocean-going vessel?

A. Approximately two years.

Q. When did you stop going to sea altogether?

A. What you mean, Mr. Gallagher, is when did I actually cease to go on a ship?

Q. What I mean is this: When did you, for the last time, act in any capacity as a member of a crew or a licensed officer on any ocean-going vessel?

A. About January of 1943.

Q. And from January of 1943, up to date, have you acted as master of any ocean-going vessel?

A. No.

Q. Have you acted as a licensed officer upon any [218] ocean-going vessel? A. No.

Q. Have you acted as an unlicensed member of the crew of any ocean-going vessel? A. No.

Q. Have you been employed in any capacity aboard any ocean-going vessel since January of 1943? A. No.

Mr. Gallagher: If your Honor will bear with me just a moment.

You have seen this?

Mr. Simpson: Yes.

Q. (By Mr. Gallagher): Captain, I show you——

(Testimony of Lorkan Felim Crawford.)

Mr. Gallagher: This has already been marked for identification Defendants' Exhibit A, your Honor.

Q. (By Mr. Gallagher): Captain, I show you Defendants' Exhibit A for identification and ask you whether that appears to be a photostat of the standard certificate of inspection issued by the Coast Guard? A. Yes.

Q. That has reference to the Linfield Victory?
A. Yes.

Q. Owned by the United States of America, represented by the Department of Commerce?

A. Yes. [219]

Q. Date of expiration 17 July, 1951.

A. Yes.

Q. That would mean it was issued about a year before that, wouldn't it? A. Yes.

Q. And that is what is called a regular certificate of inspection?

A. Regular certificate of inspection.

Mr. Gallagher: I offer that in evidence, your Honor please, as Defendants' Exhibit A.

The Court: Received.

(The exhibit referred to, marked Defendants' Exhibit A, was received in evidence.)

Mr. Gallagher: In order to conserve the captain's time, I will ask leave to defer showing this to the jurors until a little later. Or do you want me to do it now?

The Court: You do it whenever you feel the proper presentation of your case requires.

(Testimony of Lorkan Felim Crawford.)

Mr. Gallagher: All right. We will ask the jurors to look it over.

Excuse me. Let's not do it now. It has too many things on here, you will spend 20 minutes reading it.

I will show it to you later.

Q. (By Mr. Gallagher): Captain, have you ever at any time stood on the deck of a Victory-type ship immediately [220] outside of the port portion of the masthouse No. 2 in daylight, with the access door open, and looked inside that masthouse for the purpose of ascertaining what you could see without any artificial illumination inside?

A. No.

Q. Now, you have referred in your direct examination to cowl ventilators. Would you mind stepping down here a moment? There are cowl ventilators shown in Plaintiff's Exhibits 7 and 8, aren't there, Captain?

A. Yes.

Q. Now, those cowl ventilators, insofar as the upper opening is concerned, are about 72 inches in diameter, aren't they?

A. Yes.

Q. And the lower opening, which is at the roof of the masthouse, is approximately 36 inches in diameter, isn't it?

A. Yes.

Q. And you will notice that there is a screen on the outer opening of the ventilator cowl, shown in these exhibits, Plaintiff's Exhibits 7 and 8; don't you see these screens (indicating)?

A. Yes.

Q. And there is another screen at the butt or

(Testimony of Lorkan Felim Crawford.)

lower end of the ventilator shaft, as it meets the roof of the masthouse? A. Yes. [221]

Q. And that is the screen which is shown here in Plaintiff's Exhibit No. 6, isn't it (indicating)?

A. Yes.

Q. Now, the inside of this ventilator cowl is hollow, isn't it? It looks like a tube? A. Yes.

Q. So that there is no obstruction to air or anything else, excepting the two screens, isn't that right? A. Yes.

Q. Captain, have you observed seamen working in the lower tween deck of a cargo vessel with hatches apparently substantially similar to the hatches shown in Plaintiff's Exhibits 7 and 8?

A. Yes.

Q. And when half of such a hatch cover is taken off, or the after end of a hatch cover is taken off, the natural light from the outside will go down into the hold, won't it? A. Yes.

Q. And you have observed seamen working in the daylight in such portions of holds, without anything, excepting the natural light which comes from the outside and goes through the opening in the hatch, haven't you? A. No.

Q. You never have? A. No. [222]

Q. When was the last time you watched any seamen working in the hold of a ship?

A. About a year ago on Terminal Island.

Q. What ship was it?

A. The J. L. Luckenbach.

Q. That is a C-3, isn't it?

(Testimony of Lorkan Felim Crawford.)

A. Yes; C-3 or C-4, I am not sure. I believe it was a C-3.

Q. How many decks are there below the main deck?

A. Possibly four, three or four.

Q. Where were these men working?

A. In the upper tween deck.

Q. Is that two decks below the main deck?

A. No, that is one deck below.

Q. One deck below the main deck. Did you go down in that area? A. No.

Q. What were you doing on the vessel?

A. The captain was going for a pilot's license. He was one of my students and I went aboard to see him.

Q. You went over and took a look at the cargo working?

A. Well, to go to the master's quarters it was necessary to pass this particular hatch, and I always am interested and look.

Q. How much of the hatch was open, what area in square [223] footage?

A. All of the hatch was open.

Q. What was the area?

A. I don't remember the area exactly, or even close——

Q. Was it about 30 feet wide and 50 feet long?

A. About that.

Q. So all of the hatch covers were off?

A. Yes.

Q. And it was broad daylight?

(Testimony of Lorkan Felim Crawford.)

A. It was broad daylight.

Q. And is it your testimony that enough natural light didn't get down into the deck, the second deck immediately within the square of the hatch, to enable you to see it?

A. No, that is not my testimony.

Q. And see the men down there. A. No.

Q. What was that?

A. That was not my testimony.

Q. What was the effect of the natural light?

A. They had two cluster lights in the after end of the hatch.

Q. How about the rest of the hatch?

A. There were no cluster lights there, to my knowledge.

Q. Would the natural light illuminate those portions of the hatch? Did you have any trouble seeing what was going [224] on down there?

A. No.

Q. The men were plainly visible to you?

A. You mean who were cleaning?

Q. The men who were working down there in the hold.

A. The stevedores were in the lower hold.

Q. What is that?

A. The stevedores were working in the lower hold.

Q. Could you see them? A. Yes.

A Juror: May I ask a question? You say "space." How far are they? I can't visualize 30 feet or 32 feet.

(Testimony of Lorkan Felim Crawford.)

Mr. Gallagher: Can we stipulate that this room is about, close to 50 feet wide? Does your Honor have the exact measurements?

The Court: No. I did have them and kept them for such a purpose. For three years no one used them and somehow they got thrown out.

Mr. Gallagher: Fourteen and a half yards, according to my steps.

Are you willing to accept that?

Mr. Simpson: I am willing to accept that approximation.

Mr. Gallagher: All right.

Q. (By Mr. Gallagher): So that when you say that the hatch cover was about 50 feet long, it was about longer than [225] this room is wide?

A. Yes, about.

Q. And when you say it was about 30 feet in width, you mean it was about from where you are sitting to where I am standing?

A. Yes, about that.

Q. One, two, three, four, five, six, seven, eight, nine; nine times three, 27 feet.

Mr. Gallagher: Are you willing to accept that?

Mr. Simpson: That nine times three is 27?

Mr. Gallagher: That I took nine steps, each one of them being approximately a yard?

Mr. Simpson: Yes.

Mr. Gallagher: Does that clear that up for you?

The Juror: Oh, yes.

Q. (By Mr. Gallagher): The longshoremen

(Testimony of Lorkan Felim Crawford.)

were working down in this hatch that you are talking about on the Luckenbach? A. Yes.

Q. Not seamen?

A. Longshoremen were in the lower hold.

Q. Well, who was some place else that you saw, if you saw anybody else?

A. They looked to me like they were the ship's crew in the after end of the hatch of the—in the after end of the upper tween deck. They may have been maritime ship [226] cleaners, for all I know. I don't know.

Q. Were they within the square of the hatch or were they under the wings?

A. They were abaft the square of the hatch, toward the after bulkhead.

Q. Just a minute. In plain English what does that mean? A. They were abaft——

Q. Abaft means after? A. Yes.

Q. And there is a cargo space in the hold which extends a considerable area on both sides of the square of the hatch and forward of the square of the hatch and after the square of the hatch, isn't that right? A. That is right.

Q. So it is like a box, we will say, a foot wide and foot and a half long, and there is a hole cut in the top of the box, which is not as big in area as the box itself? A. That is right.

Q. So that when you talk about the square of the hatch you talk about the space which is defined and delineated by the hatch coamings?

A. Right.

(Testimony of Lorkan Felim Crawford.)

Q. Then on each side of the square of the hatch there is cargo space under the deck? [227]

A. Yes.

Q. And at the forward end of the hold or cargo space there is space beyond the forward hatch coaming? A. Right.

Q. And the same is true with the after coaming, with the after hatch coaming? A. Yes.

Q. These sailors, you say you observed, was it in the after portion of the tween deck?

A. Yes.

Q. And they were under the deck covering itself then?

A. Right. I am not sure they were sailors, Mr. Gallagher.

Q. You just saw some individuals in there then?

A. Yes.

Q. But these men were not in the square of the hatch? A. No.

Q. The longshoremen, those you knew were longshoremen, were down three decks below?

A. Right.

Q. Where were these two cluster lights?

A. They were leading over the after hatch coaming to the space where these men were cleaning the upper tween deck.

Q. That is, under the deck space?

A. Yes. [228]

Q. But there were no lights down where the longshoremen were?

A. Not that I could see.

(Testimony of Lorkan Felim Crawford.)

Q. And what were the longshoremen doing?

A. Discharging cargo.

Q. That was way down in the very bottom of the ship, wasn't it? A. Right.

Q. In working down there they were working with slings or cradles to either put cargo in or take it out? A. Right.

Q. And those platforms or cradles, or whatever you want to call them, were lifted out of the hold by the winch driver? A. Yes.

Q. And then he would lower these things back down? A. Yes.

Q. So that these longshoremen were working in that area with cargo, loading or unloading operations actually going on? A. Right.

Q. Captain, on all vessels, that is, all American vessels that you know anything about, does it frequently happen that men go to work aboard those vessels without signing articles, unless it is a foreign voyage or intercoastal?

A. You are speaking of recent years, Mr. Gallagher?

Q. Yes. [229]

A. Well, I believe there are cases where the vessel is running coastwise that they don't sign the formal articles, as we understand articles.

Q. That is what I am talking about, formal shipping articles? A. That is right.

Q. Formal shipping articles are required by statute? A. They are.

Q. With reference to foreign voyages and intercoastal voyages? A. Yes.

(Testimony of Lorkan Felim Crawford.)

Q. An intercoastal voyage would be from San Francisco to Baltimore, Maryland? A. Right.

Q. A coastwise voyage would be one from New York to Baltimore? A. Yes.

Q. And a coastwise voyage would be one from Los Angeles to San Francisco or Los Angeles to Portland or Los Angeles to Seattle or vice versa?

A. Right. [230]

* * * * *

The Court: The plaintiff starts out with presentation of the plaintiff's case and, ordinarily, we hear all the plaintiff's witnesses before hearing any defense witness.

It happens that Mr. Gallagher, who is defending the defendant in this case, has a witness from some place fairly remote from Los Angeles and that witness wants to get back to his work. So counsel have agreed he might be heard out of order, so this is a defense witness being presented at this time, but the plaintiff has not rested her case. [231]

KENNETH ALBERT WEBB

a witness called by the defendants, being first sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your name, sir?

The Witness: Kenneth Albert Webb.

Direct Examination

Q. (By Mr. Gallagher): Your name is Kenneth Webb? A. Kenneth Albert Webb.

Q. Where do you live, Mr. Webb?

(Testimony of Kenneth Albert Webb.)

A. 6116 Northeast 26th Avenue, Portland, Oregon.

Q. What is your occupation?

A. Marine surveyor.

Q. Employed by whom?

A. United States Salvage Association.

Q. Where are the headquarters of that association?

A. In New York City.

Q. How long have you been a marine surveyor?

A. Around nine years.

Q. Were you present aboard the Linfield Victory at the time Mr. George Weiss, one of plaintiff's attorneys, went aboard that vessel in May of 1952?

A. Yes.

Q. And who else was with the party? [232]

A. Mr. Walter Haines and a photographer.

Q. What is Mr. Walter Haines' business?

A. A marine surveyor in Portland, Oregon.

Q. In other words, he is in the same business you are in?

A. He is an independent surveyor.

Q. But he is a marine surveyor?

A. Yes, sir.

Q. Now, Mr. Webb, can you tell us what date that was in May?

A. May I use my notes?

Q. Do you have a memorandum you made close to that time?

A. Yes. That was 10:00 a.m. on May 10, 1952.

Q. And was it a clear day?

A. Yes.

Q. When you went aboard that vessel, did you

(Testimony of Kenneth Albert Webb.)

and Mr. Haines do anything together. Just answer that yes or no. A. Yes.

Q. And what was it that you did in conjunction with each other?

A. Measured the openings going down in the forward end of No. 3 hold and the after end of No. 2 hold on the lefthand side, looking forward.

Q. Did you measure the stanchions and the pipe railings? A. Yes, sir. [233]

Q. And other matters in and about the masthouse? A. Yes, sir.

Q. I show you here a diagram prepared by Mr. Haines—and we have agreed that it is accurate—that shows various measurements.

I don't want you to check them closely, but do they appear to you to be the measurements you and he took at the time? A. Yes, they do.

Q. All right. Now, at the time you and Mr. Haines took these measurements you were, I assume, inside the portion of the masthouse where the ventilator shaft and the escape shaft are located on the port side of masthouse No. 2?

A. Yes, sir.

Q. Was the access door, which is shown here in Plaintiff's Exhibit No. 3, open or closed when you and Mr. Webb were in there taking these measurements?

A. It was both opened and closed. We had it both opened and closed.

Q. While it was opened did you take any meas-

(Testimony of Kenneth Albert Webb.)

urements and make any notes of those measurements? A. Oh, yes.

Q. While the door was opened did you have any difficulty in seeing the figures on the rule or seeing any of the devices in and about the upper area of the masthouse? A. No. [234]

Q. Did you and Mr. Haines make notes in that masthouse with reference to your measurements, without any illumination, excepting that which came from the outside?

Mr. Simpson: Objected to as leading, your Honor.

Mr. Gallagher: I will withdraw it.

Q. (By Mr. Gallagher): Was there any—state whether there was or was not any artificial illumination inside the masthouse when you had the door open and you and Mr. Haines were measuring these things and making your notes.

A. As far as I can remember—I have no notes on that—there was a cluster light or a cargo light that was dropped down there during that period of time.

Q. Do you know where?

A. Down in the No. 2 hold, or into No. 2 ventilator.

Q. Up on top in the masthouse itself, what light did you have while making your measurements?

A. Well, you have the lights from the cowl ventilator and the door.

Q. Is that all? A. That is all.

Q. Were any lights installed in there at all until

(Testimony of Kenneth Albert Webb.)

after you and Mr. Haines got through with your measurements?

A. As far as I can remember—this is some time ago—I think we asked to have lights put in there.

Q. When? [235]

A. During the time of our survey.

Q. What were you able to see in that masthouse without artificial illumination with the door open?

A. You could see your hand rails, your protective hand rails around the No. 2 pipe, and your opening and your ladder leading down into the forward end of No. 3 hold on bulkhead 54.

Q. Was there any difficulty about observing those things without artificial illumination?

A. No, not any.

Q. What was done? Was there any light inside the masthouse with the door closed and when there was no artificial illumination in there on that day?

A. Yes.

Q. Where did that light come from?

A. That light come from the ventilator.

Q. That is the same ventilator cowl that Captain Crawford described? A. Yes.

Q. And would your description of that ventilator shaft, from having observed it personally, be the same as his? A. Very near, yes.

Q. Well, was there anything other than a hollow tube with a wire screen on both tanks?

A. No. [236]

Q. So the only thing to restrict the incoming of light from the outside would be the screens?

(Testimony of Kenneth Albert Webb.)

A. That is correct.

Q. You say you closed the masthouse door at a time when there was no artificial illumination in there? A. That is right.

Q. And when you did close the masthouse door, and without any artificial illumination inside the masthouse, what could you see just from the light that came through the ventilator cowl?

A. You could see your openings and your hand rails away down in the hold.

Q. Could you see the ladder, the top of it?

A. Yes.

Q. Could you see the hand rails or guard rails around the ventilator shaft, without any difficulty at all? A. Yes.

Mr. Gallagher: That is all.

Cross Examination

Q. (By Mr. Simpson): Mr. Webb, respecting the last question, you said you could see without any difficulty at all.

Did you mean by that that the light on the inside was the same as the light on the outside?

A. I did not. [237]

Q. Well, is it your testimony that light inside was diminished, and in order to do your surveying properly you needed lights?

A. Well, yes, I would say that.

Mr. Simpson: No further questions.

Mr. Gallagher: Just one or two more questions.

(Testimony of Kenneth Albert Webb.)

Redirect Examination

Q. (By Mr. Gallagher): Mr. Webb, when you were up there did you observe an electrical appliance outlet on the after bulkhead of the masthouse?

A. This plug-in, yes.

Q. Right there immediately to the left?

A. Right alongside the jumbo boom (indicating).

Q. That is the jumbo boom?

A. Yes, that is the jumbo boom and this is—that is it going up, and this is on the bulkhead right here (indicating).

Mr. Gallagher: Can we have that marked on this photograph No. 7, your Honor, so that the jurors will know what he is pointing to?

The Court: Yes, identify it so it will be clearly ascertainable from the complete record.

Mr. Gallagher: Mr. Simpson, would you come here, please, a moment?

I think we might be able to do it easier. [238]

Do you have any objection if I draw an arrow down there pointing to the outlet; this is the outlet here (indicating).

Mr. Simpson: None whatever.

Mr. Gallagher: Now, I have drawn an arrow on the Plaintiff's Exhibit No. 7, and at the head of the arrow I will write the letters "EO," to indicate electric plug outlet. Thank you.

Now, if your Honor please, I would like to let the ladies and gentlemen look at this certificate of

(Testimony of Kenneth Albert Webb.)

inspection,—we have got time—and point out on this photograph this electric appliance plug.

You see, this is the arrow. The head of the arrow points to the outlet (indicating), like your wall plugs at home.

The Court: You are not finished with this witness, are you, Mr. Gallagher?

Mr. Gallagher: Yes, your Honor. [239]

* * * * *

The Court: I have received the plaintiff's proposed jury instructions.

Mr. Gallagher: Yes. I have mine. I wasn't served a copy of his, so I didn't know he gave them to you.

The Court: He should serve you with a copy. I will be happy to have yours. [244]

Mr. Gallagher: I will give them to your Honor right now, and exchange with him. [245]

* * * * *

Mr. Simpson: The next witness called by the plaintiff is Doctor Frank Glauser, and his testimony will be by way of deposition.

This was taken on the 11th day of July, 1952. Mr. Gallagher has kindly consented to read the answers as I read the questions.

Mr. Simpson: "You are a medical doctor?"

Mr. Gallagher: "I am."

Mr. Simpson: "Where do you reside, Doctor?"

Mr. Gallagher: "639 Diamond Street, Philadelphia, Pennsylvania."

Mr. Simpson: "Where do you practice your profession?"

(Deposition of Dr. Frank Glauser.)

Mr. Gallagher: "Practice in Philadelphia."

Mr. Simpson: "And will you state, please, your educational background in the field of medicine?"

Mr. Gallagher: "Graduated from the University of Pennsylvania, 1923, interned at the Jewish Hospital, 1923 to 1924, Graduate School of Surgery, course in surgery, 1942 to 1943. Research surgery, 1946 to 1948, at the University of Pennsylvania, Harrison Department of Surgical Research. Master of Science degree, 1949. Diplomate of American Board of Surgery, 1948. Fellow, American College of Surgeons, 1952. Assistant professor of anatomy, Graduate School of Medicine, department of surgery. I am now coroner's physician, City of [255] Philadelphia. Commander, United States Navy, inactive reserve. I served in World War II 33 months from July, 1943, to March, 1946, overseas 15 months, South Pacific theater of war, 1944-1945."

Mr. Simpson: "When were you admitted to practice in Pennsylvania, Doctor?"

Mr. Gallagher: "1924."

Mr. Simpson: "How long have you held your present capacity, Doctor?"

Mr. Gallagher: "As coroner's physician, two and a half years."

Mr. Simpson: "You still occupy the same position?"

Mr. Gallagher: "Yes, sir."

Mr. Simpson: "For the purpose of refreshing your memory, Doctor, do you have before you any records of the coroner's office?"

(Deposition of Dr. Frank Glauser.)

Mr. Gallagher: "I do."

Mr. Simpson: "Are they official records?"

Mr. Gallagher: "They are official records."

Mr. Simpson: "Do those records disclose, Doctor, that on or about the 30th of April, 1951, the body of Nathaniel P. Hutchison was brought into the coroner's office?"

Mr. Gallagher: That is objected to on the ground the records would speak for themselves, if they were admissible. [256]

The Court: Is that an objection?

Mr. Gallagher: Yes, your Honor.

The Court: Sustained.

Mr. Simpson: "Did you examine this body?"

Mr. Gallagher: "I did."

Mr. Simpson: "When did you examine the body?"

Mr. Gallagher: "On the fifth month second, 1951."

Mr. Simpson: "Will you describe, please, the nature and extent of your examination?"

Mr. Gallagher: "Yes; 66 inches in height. Weight was approximated at about 165 pounds. External examination showed a hemorrhage under the scalp. The internal examination showed a fracture, left side of the skull, long linear fracture of the frontal, temporal and parietal bones.

"Opening the skull we saw subdural hemorrhage. The lungs were not noteworthy. The heart showed acute dilatations. The liver, stomach, kidneys and intestines were not abnormal.

(Testimony of Dr. Frank Glauser.)

“The bladder contained 40 cc of urine.”

May we stipulate that means cubic centimeters?

Mr. Simpson: So stipulated.

Mr. Gallagher:

“Cause of death, fractured skull, subdural hemorrhage. [257]

“This is countersigned by Chief Coroner’s Physician, W. S. W., which stands for William S. Wadsworth.”

Mr. Simpson: “In other words, these discoveries were made during the performance of an autopsy?”

Mr. Gallagher: “That is correct.”

Mr. Simpson: “And you say the finding as to the cause of death was a subdural hemorrhage?”

Mr. Gallagher: “Fractured skull and subdural hemorrhage.” [258]

* * * * *

Mr. Simpson: At this time, your Honor, counsel has agreed to stipulate to the introduction of the ship’s log, the SS Linfield Victory, and we would like to offer it as Plaintiff’s 15. [299]

Mr. Gallagher: That is correct, your Honor. But I think Mr. Simpson should make it clear that these are photostatic copies of the ship’s log commencing at midnight of April 16, 1951. In other words, you start with 0000 hours, dated April 17, 1951, and that is midnight.

Mr. Simpson: Correct.

Mr. Gallagher: And the entries go up to and including April 30, 1951. That is correct?

Mr. Simpson: That is correct.

Mr. Gallagher: No objection, your Honor.

The Court: Received into evidence.

(The document referred to was marked Plaintiff's Exhibit 15 and received in evidence.)

The Court: You may read any portion that you wish to particularly direct the attention of the jury.

Mr. Simpson: Now, I would like to call Mrs. Emma Hutchison to the stand.

EMMA HUTCHISON

called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, please?

The Witness: Emma Hutchison.

The Court: Please bear in mind it is a large courtroom, Mrs. Hutchison. The jury all want to hear your testimony, [300] so you will have to speak out with a little more force to your voice.

The Witness: All right. I shall.

Direct Examination

Q. (By Mr. Simpson): Mrs. Hutchison, where do you live?

A. I live at Avenal, California.

Q. What is your address in Avenal?

A. Box 1052 or 108 West Tennyson.

Q. For how long have you lived there?

A. Off and on since 1937.

Q. Mrs. Hutchison, are you the widow of Nathanael Patrick Hutchison, named in this action?

(Testimony of Emma Hutchison.)

A. Yes, I am.

Q. Will you tell me when you and Nathanael Patrick Hutchison were married?

A. November 4, 1940.

Mr. Simpson: Can all of you hear Mrs. Hutchison?

Q. (By Mr. Simpson): You will have to speak a little louder, please.

A. On November 4, 1940.

Q. Can you tell me what was Mr. Hutchison's work?

A. He was a steel worker or iron worker on construction iron work, and also worked in the oil fields and was a seaman.

Q. When did he do work as a seaman? [301]

A. He began in 1943, I believe.

Q. Do you remember the general kind of work that he did?

A. Able seaman and boatswain's mate and maintenance man. That is all I know.

Q. What kind of ships did he work on, Mrs. Hutchison?

A. Well, cargo ships would be all I could tell you. I don't know the different—

Q. Any particular line or lines?

A. He worked for different lines. He worked for, just offhand, Sudden & Christainsen, Moore McCormack, Pacific Far East, Burns Steamship.

Q. When was the last time that you saw your husband before his death in 1951?

A. About March 21, 1951.

(Testimony of Emma Hutchison.)

Q. What was the condition of his health at that time?

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that it calls for a conclusion. If it purports to include the condition of his heart, that would require medical knowledge.

The Court: I think it is apparent that the question goes to the appearance of health, insofar as a layman might observe it.

Mr. Simpson: That is correct, your Honor.

The Court: The objection is overruled. [302]

Mr. Gallagher: In other words, just the things you can see from the outside?

The Court: Well, I suppose so, conversations, observations. It is a layman's opinion, without having made apparently a detailed inquiry.

Q. (By Mr. Simpson): You may answer, Mrs. Hutchison.

A. Well, I would say it was good. He had no—he slept well, ate well, was in good spirits.

Q. Any complaints ever made to you?

A. Not that I can recall.

Q. Now, Mrs. Hutchison, after his death were you appointed as administratrix of his estate?

A. Yes.

Mr. Gallagher: I will stipulate she was, and that she is.

Mr. Simpson: At this time, your Honor, we would like to offer into evidence then Letters of Administration as Plaintiff's next in order, whatever number that would be.

(Testimony of Emma Hutchison.)

The Clerk: 16.

Mr. Simpson: 16.

The Court: Received.

(The document referred to was marked Plaintiff's Exhibit 16 and received in evidence.)

Mr. Gallagher: This is offered for the sole purpose for proving Mrs. Hutchison was appointed?

Mr. Simpson: Precisely. [303]

Mr. Gallagher: No objection for that purpose. I stipulated to it, anyhow.

Q. (By Mr. Simpson): Mrs. Hutchison, on April 24, 1951, how old was your husband?

A. Forty-four.

Q. And on that particular day, what was your age? A. Fifty-three.

Q. Now, did you and Mr. Hutchison, respecting your income for 1950, file a joint return?

A. Yes, we did. We always did.

Mr. Simpson: Do you want to see this?

Mr. Gallagher: No objection.

Mr. Simpson: This has been marked, your Honor.

The Court: Are you offering it in evidence?

Mr. Simpson: I am wondering if it needs to be marked again for identification.

The Court: Just refer to it. The purpose for marking them is to get a means of identification.

Mr. Gallagher: It will have to be marked so it will go in sequence.

Mr. Simpson: Yes.

The Clerk: 17.

(Testimony of Emma Hutchison.)

(The document referred to was marked Plaintiff's Exhibit 17 for identification.)

Q. (By Mr. Simpson): Mrs. Hutchison, I show you a document [304] purporting to be an individual tax return by Emma E. and N. P. Hutchison, designated as Plaintiff's 17 for identification.

Mr. Gallagher: It is in evidence, isn't it?

Mr. Simpson: Not as yet.

Mr. Gallagher: I thought we stipulated it could go in.

Mr. Simpson: That is fine then.

Mr. Gallagher: You don't have to lay any further foundation for it.

The Court: Upon the stipulation, it is received.

(The document heretofore marked Plaintiff's Exhibit 17 was received in evidence.)

Mr. Simpson: Thank you, your Honor.

Thank you, Mr. Gallagher.

Q. (By Mr. Simpson): Mrs. Hutchison, did Mr. Hutchison in any way contribute to your support?

A. Yes, whenever he came off a trip he would give me around seventy-five percent or thereabouts of his money. And he kept the rest, and we decided where to put it and what to do with it.

Q. The jury cannot hear you.

A. I am sorry. I said he would give me around seventy-five percent of his wages and kept the rest and that—well, we disposed of it, however we did, in the bank or whatever we wanted to do with it. You know, like any other family does. [305]

Q. That was his consistent practice?

(Testimony of Emma Hutchison.)

A. Yes, it was. Of course, the trips were in between times and sometimes it would be three months, sometimes it would be two months, sometimes it would be only six weeks or a month.

Mr. Simpson: You may cross examine, Mr. Gallagher.

Cross Examination

Q. (By Mr. Gallagher): Mrs. Hutchison, your husband was away quite a bit of the time, wasn't he?

A. On and off, yes, whenever he was on the ships and working.

Q. So that you wouldn't know, would you, of your own knowledge,—by that I mean from having seen him do it—whether he had ever gotten a physical examination from a doctor while he was away from you?

A. I know he got them whenever he had to go on the ship, because they have to get them whenever they go to work on a ship; they have to get a physical examination.

Q. Were you ever present at any time when he had an examination?

A. No, of course, I wasn't there then.

Q. Were you present at any time when he may have gone to a private physician for an examination?

A. Well, I believe I was one time in Avenal. He had a [306] bad cold——

Q. I am not asking you what he had.

A. Well, he did. That is the only reason I can tell you, he had a bad cold and he called the doctor and he just checked him over.

(Testimony of Emma Hutchison.)

Q. He called a doctor?

A. Yes, he did. He checked him over for a cold. He gave him a prescription for it.

Q. Is that the only occasion you know of when he called a private physician or went to see a private physician? A. I believe it is.

Q. Now, Mrs. Hutchison, did Mr. Hutchison have any relatives in Baltimore, Maryland?

A. No, he did not.

Q. Did you? A. No, sir.

Q. Did you have any friends there, that you know of? A. Not that I know of.

Q. Did Mr. Hutchison have any friends in Baltimore, that you know of?

A. Not that I know of; not that I could tell you.

Q. Prior to the time you married Mr. Hutchison, had been married to a man named McFee, who died? A. Yes, I was.

Q. And how many children do you have as a result of [307] the marriage to Mr. McFee, and what are their ages?

A. I have five living and I have three small ones that died when they were children, babies.

Q. You have five living? A. Yes, sir.

Q. Now, you said that Mr. Hutchison had been a steel worker. A. Yes, sir.

Q. Would you please tell us what you meant by that, Mrs. Hutchison? What did he do in connection with steel?

A. Well, you know, when they go to build bridges and things they put little iron bars—I am

(Testimony of Emma Hutchison.)

not very good at this. And they wire them together and it is the construction that is put in before the steel is put in, before you pour the concrete into it.

Q. You mean putting pieces of steel——

A. Whenever they build bridges or build big buildings they have these little pieces of steel they put in and wire them, and put them in different places, and then pour the concrete in.

Q. He was a structural steel worker?

A. That is correct, sir.

Q. He worked not only on the ground but high up on the buildings in the course of construction?

A. Yes, sir. [308]

* * * * *

Mr. Simpson: With respect to admissions, your Honor, it had been the plaintiff's desire to offer in evidence the following portion of the admission to plaintiff's request for admissions designated as 1c.

The Court: You had better read it, because I don't have it immediately before me.

Mr. Simpson: The admission was, that the defendant admit that "on April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

The portion we would offer into evidence is the following, in answer to that, appearing on page 3 of the defendant's reply:

“On April 24, 1951, there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer ‘Linfield Victory’ in which the body of Nathanael Patrick Hutchison was found on April 30, 1951.”

We would not care to offer the balance of the statement, which we consider to be argument by the defendant, which reads:—

The Court: Don’t read it. We will see if there is an objection to this.

Mr. Gallagher: I object to the introduction of the request for the admission, and I object to the introduction of either part or all of the reply to request 1c., upon the [329] ground that there is no evidence in this record, direct or indirect, showing that at any time when Nathanael Patrick Hutchison could have been within the area of masthouse number two, in the course of his employment, there was any necessity for any artificial light of any kind or character.

There is no evidence whatever that the masthouse door was closed at any time between 8:00 A.M. on April 24, 1951, and 12:30 P.M. on the same date.

I call your Honor’s attention to *Smith v. Acadia Overseas Freighters*, 202 Fed. (2d) 141, where the court says:

“The record is both meager and chaotic. It is not clear at what time of day the accident occurred; whether during the daytime or after dark. * * * The time of day when the accident occurred is material for it has direct bearing on the issue of the degree

of lighting in the hold and hence on the liability of the ship. The lighting in the hold is relevant to the issue of whether the libelant was able to see that the hooks on the extension ladder were defective * * * It also does not appear whether lights were or were not necessary for we cannot be certain at what time, in daylight or darkness, the accident occurred."

As a further ground of my objection, there is no evidence, direct or indirect, showing the time of day when Nathanael [330] Patrick Hutchison got into the ventilator shaft. Neither is there any evidence, direct or indirect, showing the date upon which he got into the ventilator shaft, to wit, whether it was the 24th of April or the 25th of April.

And there is no evidence, direct or indirect, showing, or from which a jury could find that he got into that ventilator shaft or went into the mast-house at the time he got into the ventilator shaft, in the course of his employment.

The complaint alleges in Paragraph VII that Nathanael Patrick Hutchison was in the employ of the defendant on April 24, 1951, and the answer of the defendant denies that Nathanael Patrick Hutchison was in the employ of the defendant at any time on April 24, 1951, after 12:30 P.M.

And there is no proof in the record, direct or indirect, that he was an employee of the defendant at any time after 12:30 P.M. on April 24, 1951.

Now, certainly, and in addition to that, the question that Mr. Simpson refers to in his request—

and without waiving the foregoing objections or any of them, I want to call your Honor's attention to the scope of the request—"On April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was [331] found."

Now, Mr. Simpson wants the court to decide for the defendant what its admission is. Now, the defendant answered that request as follows:

"On April 24, 1951, there were no permanent electrical installations inside that portion of the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was found on April 30, 1951."

Your Honor will notice that the request for admission does not refer to "permanent". It just refers—yes, it does, "permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination,".

The defendant's response to the request continues as follows:

"There was a permanent electrical installation consisting of electric current outlets permanently installed on the after bulkhead of said masthouse and within 55 inches of the door leading into that portion of the masthouse enclosing said ventilator shaft, and the said permanent electrical installation could have been used on April 24, 1951, if neces-

sary, for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which the body of Nathanael Patrick Hutchison was [332] found on April 30, 1951."

And in that connection I call your attention to the testimony which shows that the electric outlet referred to in that admission is shown on Plaintiff's Exhibit Number 7 on the after bulkhead of the masthouse, a place to plug in.

I also call your Honor's attention to the fact that in Plaintiff's Exhibit Number 4 you see a floodlight, a portable floodlight in the locker on the starboard side of the masthouse.

The Court: Have you finished the objection?

Mr. Gallagher: Yes, your Honor.

The Court: Overruled.

Mr. Simpson: Your Honor, the next admission which the plaintiff would offer into evidence is the admission designated as 1f., in which the defendant states on page 4, "Defendant admits that during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service."

The balance of the admission we do not offer.

The Court: Is there any objection?

Mr. Gallagher: Yes, your Honor. I object to the admission because it shows on its face that the entire possession of the vessel by the defendant was pursuant to a bareboat [333] charter agreement,

Contract No. M.A. 14, a written contract between the United States government and the defendant.

Now, when you refer to a written contract in any answer the contract becomes necessary, in order to ascertain the scope of the operation or management of the vessel, when the answer says that the only operation or management of the steamer was pursuant to a written agreement.

Now, the balance of that answer excises one portion of the written contract. I have got the whole contract here. And that would be only for the court, not for the jury.

The court would take the contract, the bareboat charter and determine from it, in the absence of latent or patent ambiguities that might raise statements of fact, and require the introduction of evidence, what the right of the defendant was and how far it had any right to operate or manage the vessel.

See, this contract, your Honor, you can see in the admission that we show what we mean, "Defendant denies that it had unlimited control over the steamship Linfield Victory". That was one of the questions.

The request for admission is as follows:

"At all times during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, you were operating, controlling, and managing the steamship, SS Linfield Victory." [334]

Your Honor will notice that in the answer the defendant denies the statement that it had un-

limited control over the steamer Linfield Victory, and in this respect alleges that clause 11, Part 2 of said bareboat charter agreement provided as follows:

“‘Structural changes. The charter shall make no structural changes in the vessel and shall make no changes in the machinery, boilers, appurtenances or spare parts thereof without in each instance first securing the written approval of the owner.’ The owner of said vessel was, at all times mentioned herein, the United States of America, Department of Commerce, Maritime Administration.”

Your Honor will see they, in their request, pinned it to this written contract.

The Court: Objection overruled.

Mr. Simpson: Your Honor, the next admission that plaintiff would offer is designated as 1g. on page 4:

“Defendant admits that all times between April 1, 1951, and October 13, 1952, it was doing business within the southern district of California, Central Division.” [335]

* * * * *

Mr. Gallagher: At this time, if your Honor, please, the defendant offers request for admission on page 2 reading as follows:—

The Court: An admission made by the defendant?

Mr. Gallagher: A request and a response to it.

The Court: I just want to keep it clear.

Mr. Gallagher: “On April 24, 1951, you provided no temporary electrical installations of any

kind whatsoever which could be used for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

The Court: I am sorry, Mr. Gallagher, the Bailiff needed to ask me a question and I lost some of your reading.

Mr. Gallagher: The plaintiff requested the defendant to admit that the following statement is true, to wit:

"1d. On April 24, 1951, you provided no temporary electrical installations of any kind whatsoever which could be used for furnishing artificial illumination in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

Now, the answer to that one is on page 3:

"1. (d) Defendant, by reference thereto, [337] incorporates herein its answers to purported statements 1(a), 1(b), and 1(c) with the same effect as though said answers were, and each thereof was, repeated in detail herein."

Now, with reference to 1b:

"Defendant cannot truthfully admit or deny the purported statement contained in 1(b) for the reason that there were portable lighting appliances and devices, other than fixtures, which on April 24, 1951, could have been stored in the masthouse enclosing the ventilator shaft on the steamer 'Linfield Victory' in which, on April 30, 1951, the body of

Nathanael Patrick Hutchison was found, or such appliances or devices could have been stored, if not being stored in said portion of the masthouse, in other portions of the masthouse immediately adjacent to that part of the masthouse enclosing said ventilator shaft.”

And this part of the answer to 1c:

“There was a permanent electrical installation consisting of electric current outlets permanently installed on the after bulkhead of said masthouse and within 55 inches of the door leading into that portion of the masthouse enclosing said ventilator shaft, and the said permanent electrical installation could have been used on April 24, 1951, if necessary, for furnishing artificial illumination in the [338] masthouse enclosing the ventilator shaft on the steamer ‘Linfield Victory’ in which the body of Nathanael Patrick Hutchison was found on April 30, 1951.”

That is taken from the answer to request 1c. And both of those portions are adopted by reference in answering request 1d.

The Court: I am not able to recall at the moment what the rule is with respect to a party who has been asked to make admissions, offering those admissions, or the answer to request for admissions, where the party, who has asked them has not done it.

That is, is the right to offer the answers to requests for admissions solely that of the party who made the request for admissions or does the party who answered the requests for admissions have the

right to make the offer into evidence, or to have the answer to the request for admissions received into evidence as part of his case? What is the rule on that?

Mr. Simpson: I can't answer that, your Honor. I think it is at the very end of rule 36, if I am not mistaken. But I don't recall precisely what it says.

The Court: Do you have rule 36 there?

Mr. Simpson: No, I do not, your Honor.

Do you, Mr. Gallagher?

Mr. Gallagher: No. It is in your Honor's rules of civil procedure. But it is no different than [339] a deposition would be, no different than interrogatories.

And the rules provide that interrogatories can be used for any purpose for which you might take a deposition.

We don't believe that the court has the right to delete from the language chosen by the defendant, in answering any request for admission, any part or portion thereof, but your Honor has done that at the request of the plaintiff.

In other words, when you make an admission you are entitled to qualify it.

The Court: I haven't done that. I have simply granted permission to Mr. Simpson, or, I have admitted into evidence the part he has offered. I didn't say the other was rejected.

If you want it read you make your offer.

Mr. Simpson: Your Honor, may I state an objection respecting the offer by Mr. Gallagher, with

respect to 1d, irrespective of what the rule might say.

The Court: Yes.

Mr. Simpson: I would object to it being offered on the ground that the defendant starts his answer to the requested admission with the statement that "Defendant cannot truthfully admit or deny" and then goes ahead to explain why they cannot admit or deny.

And if they cannot admit or deny truthfully, then I would say that the explanation as to why they cannot do that would not constitute an admission and should not be admissible. [340]

Mr. Gallagher: I agree with that, but in the answer to 1c there is no statement that the defendant cannot truthfully admit or deny that request 1c.

And your Honor permitted Mr. Simpson to introduce only the first sentence in the answer to 1c. I contend, on behalf of the defendant, that without waiving our objections as to relevancy, which I have stated in detail about course of employment and time when the accident happened, and no foundation with reference to the condition of visibility in the masthouse, at any pertinent time I contend, without waiving those objections, that the court is without right to permit the plaintiff to read a part of an admission when the defendant under oath specifies qualifications to the part which is offered.

And I would request your Honor to compel the plaintiff, if he reads any of admission to request 1c that he read all of it.

The Court: Would you read it all, Mr. Simpson, as it exists? I mean now, so I will——

Mr. Gallagher: I will give it to your Honor.

The Court: I do not have it before me.

Mr. Gallagher: Here's my copy, your Honor. It is this one here, 1c (indicating).

The Court: What was the request, Mr. Simpson?

Mr. Simpson: The request was we be permitted—— [341]

The Court: What was the request for admission, 1c? It is not set forth in the reply.

Mr. Simpson: Yes, sir. The request that they admit, "On April 24, 1951, there were no permanent electrical installations of any kind whatsoever, which could be used for furnishing artificial illumination, in the masthouse enclosing the ventilator shaft on the SS Linfield Victory in which, on April 30, 1951, the body of Nathanael Patrick Hutchison was found."

Mr. Gallagher: And the last part of the admission shows there was a permanent installation, which could have been used to furnish artificial light in the masthouse.

The Court: The motion of the defendant that all admission 1c be read is granted.

Where I have granted Mr. Simpson's motion and overruled your objection, Mr. Gallagher, I have intended only to rule that the portions he offered were admissible and not to rule affirmatively that the portions he had not offered were not.

Mr. Gallagher: I did not understand that, your Honor. I am sorry, I didn't get it correctly.

The Court: You are being very precise in your objections and requirements of the court's rulings so I am going to undertake to rule with exactness where I can.

Mr. Gallagher: Well, then, we had another one where you offered only part of it, isn't that right, Mr. Simpson? [342]

Mr. Simpson: That is 1f.

Mr. Gallagher: 1f. That is the one where the plaintiff requested the defendant to admit the following statement to be true:

"At all times during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, you were operating, controlling, and managing the steamship, SS Linfield Victory."

Now the answer to that request, as set forth in the defendant's verified answer is as follows:

"Defendant admits that during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service. Defendant denies that it had unlimited control over the steamer 'Linfield Victory' and in this respect alleges that Clause 11, Part 2 of said *bareboard* charter agreement provided as follows: 'Structural changes. The charterer shall make no structural changes in the vessel and shall make no changes in machinery, boilers, appurten-

ances or spare parts thereof without in each instance first securing the written approval of the owner.' The owner of said vessel was, at all [343] times mentioned herein, the United States of America, Department of Commerce, Maritime Administration."

Now, all of that answer is relevant to the question of operation, control and management.

When the plaintiff requests us to admit the operation, management and control, pursuant to a written agreement, we are entitled to qualify that answer and show any part of the written agreement which is relevant to that matter of control.

And that particular part of the bareboat charter agreement shows that this defendant had no legal right to make any structural changes in this vessel.

The Court: Do you think that that would mean they won't have the right to install a protective device of some kind, so that men wouldn't fall down hatches or holes?

Mr. Gallagher: I contend, for example, to be specific about it, that the defendant, pursuant to that contract with the United States of America, had no right whatever to place any structural changes or create any structural changes in that masthouse.

Now, if we are talking about temporary things, like if you go to the hardware store and buy a bird screen and toss it in there, that wouldn't be a structural change. But this bareboat charter refers to structural changes.

Mr. Simpson: Your Honor, might I state an objection? [344]

The Court: Certainly.

Mr. Simpson: An objection regarding the plaintiff's reluctance to read this latter part, or portion, offered by Mr. Gallagher.

We would object to being required to read it, first, because we have requested an admission in the first sentence Mr. Gallagher or the defendant makes——

Mr. Gallagher: That is not true.

Mr. Simpson: ——but in the language, "Defendant admits that during the month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service."

Then he adds, "Defendant denies".

We are willing to read the admission of the defendant, and the court has ruled we should read the entire admission, with the qualification, when he goes on to expressly take the antithesis or make a denial, we feel that would be an imposition on the plaintiff, which would rob of it any benefit from the admission.

The Court: I don't see benefit from the admission, anyway.

Do you still want to read the portion you offered?

Mr. Simpson: I will state this for the record: I had no intention of reading or presenting this [345] to the jury. The only one I am going to present is

the one I have referred to, which is included as an instruction, regarding the lights, but I at least wanted to offer into evidence——

The Court: The court takes notice of the contents of these files. There is no purpose in offering things into evidence which you are not intending to present to the jury, because the court is the judge of the legal questions. And admissions are always before the court, aren't they?

Mr. Gallagher: I don't think so, your Honor, for this reason: If they were, then the court could use anything in the file in instructing the jury, or in making determinations in its own mind.

That would deprive the defendant of knowing just what the court was going to use, or what the court was going to permit the jury to use by way of instructions.

It would prevent the defendant from making his objections. It would prevent the defendant from permitting the court *ex mero motu* in deleting or emasculating the substance of an admission, which is in the form of pleadings and under oath.

That is why I say your Honor cannot take judicial notice of these requests for admissions or the admissions, without notifying the defendant just what parts you are going to consider and what parts you are not, so we have an opportunity to object, if there are any valid objections to it, with respect to that course of intended conduct on the part of the court. [346]

The Court: The court holds as to admission 1f, that the words "Defendant admits that during the

month of April, 1951, pursuant to bareboat charter agreement (Contract No. M.A. 14) with the United States of America, it was operating and managing the steamer or steamship 'Linfield Victory', in its intercoastal service" constitutes the admission.

That the other matter is a gratuitous addition, which has no part, no proper part in the answer or in the making of that particular admission that was requested.

Mr. Gallagher: In this connection, your Honor, I now offer as an exhibit for the consideration only of the court photostatic duplicate of Contract Number M.A. 14, to wit, the one referred to in the request for admissions.

The Court: That will be received. It is a little out of order, since we are still hearing the plaintiff's case, but I will receive it.

Mr. Simpson: Upon this there will be no controversy. Just for the record, the plaintiff would like to withdraw proposed instruction number 11.

The Clerk: Defendant's B.

(The document referred to was marked Defendant's Exhibit B and received in evidence.)

Mr. Gallagher: You mean 11 of your proposed instruction or just that one? [347]

Mr. Simpson: Proposed instruction number 11.

Mr. Gallagher: Now, I trust your Honor would enjoy a recess, not that you need it, but perhaps it might be in order. We can't get through today, anyhow, now.

The Court: Yes. I wish counsel on both sides would give realistic estimates of the time required

for these proceedings out of the presence of the jury. It is very irksome to be called in at 10:00 o'clock and then not get into the courtroom until after 11:00, which is going to be the case today.

We have had a lot of delay with this jury. It is a common vice of lawyers, not just you, to figure, "Well, I can handle this uninterrupted, if it is done right, in ten minutes" but to not take into consideration either the density of the judge or your opposition or the objections that they might legitimately offer to what you intend to do, or the various questions which are likely to occur.

Now, I don't want to rush you on these things, and I don't want to invite undue delay either, but it is a hardship,—not a serious one—but nonetheless an irritating hardship on the jurors, and it is well for all litigants to keep the jury from being irritated, if possible.

Mr. Gallagher: Were it not for this second Glauser deposition and the Daly deposition, I think we could easily finish all of the evidence today, because, as I understand it, Mr. Simpson is through with the exception of reading the testimony [348] of John Hutchison and whatever your Honor finally admits with reference to the Glauser and the Daly depositions.

Isn't that so?

Mr. Simpson: That is so.

The Court: We can't do it today. We will take the morning recess.

(Short recess taken.)

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Good morning. I am sorry I told you to be here at 10:00, when we couldn't reach the jury phase of the case until almost ten after 11:00.

We can't always foresee these legal problems, and the time they will require, with exact certainty.

The jury being present, counsel here, you may proceed.

Mr. Simpson: The plaintiff at this time will read into evidence the testimony of John Hutchison. Mr. Gallagher will be reading the answers of the witness John Hutchison and I will read the questions to him.

Mr. Gallagher: We can stipulate this was testimony given on direct?

Mr. Simpson: That is correct. [349]

JOHN HUTCHISON

Mr. Simpson: "Where do you live, Mr. Hutchison?"

Mr. Gallagher: "Long Beach."

Mr. Simpson: "What is your business?"

Mr. Gallagher: "I have a mailing and addressing firm."

Mr. Simpson: "Are you related to the deceased?"

Mr. Gallagher: "I am."

Mr. Simpson: "What is that relationship?"

Mr. Gallagher: "I am his brother."

Mr. Simpson: "When did you last see your brother?"

Mr. Gallagher: "About a month before he died."

Mr. Simpson: "Upon that occasion what did you observe the condition of his health to be?"

(Testimony of John Hutchison.)

Mr. Gallagher: "It was good; very good."

Mr. Gallagher: And I assume, your Honor, that is limited to what could have been observed by a person.

The Court: I am sorry. I was reading a note from the clerk.

Mr. Gallagher: I am sorry. Your Honor, the question was asked, "Upon that occasion what did you observe the condition of his health to be?"

The witness said, "It was good; very good."

I request your Honor to limit, the effect of that answer, the same as you did with Mrs. Hutchison, to what you could observe, what a layman could observe from the outside.

The Court: I think that the jury will [350] understand that is all a lay witness could undertake to answer.

Mr. Simpson: "Mr. Hutchison, directing your attention to the day of May 25, 1951, do you recall the events of that day?"

Mr. Gallagher: "On or about that time together we visited the Linfield Victory."

May we stipulate, Mr. Simpson, you were asking the questions?

Mr. Simpson: Correct.

"Upon arriving at the ship, what did you do?"

"Will you answer the question, what you observed?"

Page 35, line 10.

Mr. Gallagher: Well, page 34 is a little colloquy at lines 20 to 22, which pinpoints the date.

(Testimony of John Hutchison.)

Mr. Simpson: "What was the day we are inquiring about now?"

Mr. Gallagher: Mr. Simpson said, "May 27, 1951."

Mr. Simpson: "Will you answer the question, what you observed?"

Mr. Gallagher: "A guard at the top of the gangplank, a man in a uniform."

Mr. Simpson: "After boarding the ship, Mr. Hutchison, did you go into the area where your brother was found?"

Mr. Gallagher: "I did."

Mr. Simpson: "What did you observe there?"

Mr. Gallagher: "In the space that has been described as the masthouse, I saw the ladder and I saw the rail and the ventilating shaft; I saw the door."

Mr. Simpson: "Did you observe anything else about the condition of the masthouse?"

Mr. Gallagher: Your Honor please, the last part of the answer commencing with the disjunctive "or" at the top of page 37 I move to strike upon the ground that it states a conclusion and opinion of the witness.

The Court: The motion is denied. It will be understood that, of course, this is a layman's report of a layman's observation. It is not intended to be an expert opinion.

Mr. Gallagher: "We had the door opened and saw that there were no light fixtures or evidence of any light in there."

(Testimony of John Hutchison.)

"We saw the man introduced as the First Mate."

Mr. Simpson: The court now asks some question of the witness commencing at page 43.

"In the interest of expediency only, I will try to put a few questions.

"Did you go inside that masthouse?"

Mr. Gallagher: "Yes, sir."

Mr. Simpson: "What time of the day or night was it?"

Mr. Gallagher: "It was—" no, excuse me. "In the morning, before noon." [352]

Mr. Simpson: "What is it a day of obscurity, that is, a cloudy, dark day, or a bright day?"

Mr. Gallagher: "It was a sufficiently light day. It was a bright day."

Mr. Simpson: "Did you go inside the mast-house?"

Mr. Gallagher: "I did."

Mr. Simpson: "When you got in, did you close the door, or was the door closed or open at all times?"

Mr. Gallagher: "We opened the door to get in."

Mr. Simpson: "Did you close the door after you went in?"

Mr. Gallagher: "Yes, we did."

Mr. Simpson: "Did you see around?"

Mr. Gallagher: "No light on, no, sir."

Mr. Simpson: "What was the condition of visibility?"

Mr. Gallagher: Keep on going.

Mr. Simpson: "'No light, no, sir,' might be

(Testimony of John Hutchison.)

taken to mean there was not any light fixture or open window or anything of that kind, but could you see your hand before your face at two feet?"

Mr. Gallagher: "Not when the door is closed, no."

Mr. Simpson: "Was there any window in the masthouse?"

Mr. Gallagher: "No windows."

Mr. Simpson: "Was there any transom or skylight in the masthouse?" [353]

Mr. Gallagher: "No transom or skylight."

Mr. Simpson: "Could you see a light coming in through the crack of the door?"

Mr. Gallagher: "No light coming from the door."

Mr. Simpson: "You mean to tell us it was absolute darkness when the door was closed?"

Mr. Gallagher: "That is right."

Mr. Simpson: "You had to go through the door to get in?"

Mr. Gallagher: "Yes."

Mr. Simpson: "So you saw inside that masthouse when the door was at least partly open, did you?"

Mr. Gallagher: "That is right."

Mr. Simpson: "Did you see into that masthouse when the door was fully open?"

Mr. Gallagher: "Yes, practically when I am at right angles to the masthouse."

Mr. Simpson: "Could you see around pretty

(Testimony of John Hutchison.)

well when the door was open when you were in the masthouse? Couldn't you see around the masthouse all right?"

Mr. Gallagher: Would you please read that question over, Mr. Simpson?

Mr. Simpson: "Couldn't you see around pretty well when the door was open when you were in the masthouse? Couldn't you see around the masthouse all right?" [354]

Mr. Gallagher: "As soon as your eyes become accustomed to the relative darkness inside coming from the sunlight outside, it was easy to see."

Mr. Simpson: "You mean that it was like any enclosed room when you open a door and you are coming in from a bright light, you have to get accustomed to the darker light?"

Mr. Gallagher: "That is right."

Mr. Simpson: "To what parts——"

Mr. Gallagher: No, there is another question at line 21. Wait a minute.

Skip that one, that is right.

Mr. Simpson: "To what parts of the masthouse did you go?"

Mr. Gallagher: "I was in all parts of the particular section of the masthouse."

Mr. Simpson: "Did you see any ladders?"

Mr. Gallagher: "Yes."

Mr. Simpson: "When the door was open, you could see those ladders all right?"

Mr. Gallagher: "Yes."

(Testimony of John Hutchison.)

Mr. Simpson: "When the door was closed, could you see them?"

Mr. Gallagher: "No."

Mr. Simpson: "When the door was halfway open, could [355] you see them?"

Mr. Simpson: "Yes; any light would show the ladders."

Mr. Simpson: "Did you see any electrical conduits on the walls or ceiling of that masthouse?"

Mr. Gallagher: What page is that?

Oh, I see.

Mr. Simpson: 46.

Mr. Gallagher: "No, sir."

Mr. Simpson: "In your lifetime you have seen walls and ceilings where there had been light fixtures that had been removed, and you could see the scars on the walls or ceilings; do you know what I mean?"

Mr. Gallagher: "Yes."

Mr. Simpson: "Did you see anything of that kind in that masthouse?"

Mr. Gallagher: "I did not."

Mr. Simpson: "Well, did you look for it?"

Mr. Gallagher: "Yes, I did."

Mr. Simpson: The court says, "You may take over." [356]

* * * * *

RAYMOND C. SIMPSON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir.

The Witness: Raymond C. Simpson.

Direct Examination

Q. (By Mr. Gallagher): Mr. Simpson, you are a regular member of the State Bar of California?

A. Yes.

Q. And ex officio a member of the bar of this court as well? A. That is correct.

Q. Now, Mr. Simpson, did you at any time receive a copy of the shipping articles which covered the intercoastal voyage of the Linfield Victory from San Francisco to the east coast and return? [360]

A. Of my own knowledge I do not recall such; my office may have.

Q. Did you at any time receive from me the names and addresses of the members of the crew of the Linfield Victory? A. Yes, I did.

Q. Can you tell us whether you received that information over three years ago?

A. Yes, more than three years ago.

Q. In other words, you got the names and addresses of all of the unlicensed crew members?

A. That is correct.

Q. And also the names and addresses of all of the officers in the deck department?

A. At least, it purported to be complete. [361]

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